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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 227.

THE UNITED STATES, APPELLANT,

vs.

THE MILLIKEN IMPRINTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1905.

(19709.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 227.

THE UNITED STATES, APPELLANT,

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THE MILLIKEN IMPRINTING COMPANY.

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1 I.—*Original petition.—Filed Dec. 10, 1903.*

In the United States Court of Claims.

THE MILLIKEN IMPRINTING COMPANY, CLAIMANT,
v.
THE UNITED STATES. } No. 24574.

To the Honorable the Judges of the United States Court of Claims:

Your petitioner, the Milliken Imprinting Company, respectfully shows as follows:

I. That it is a corporation duly created and existing under the laws of the State of New York, and authorized to enter into contracts of the character hereinafter set forth; that its principal office and place of business is in the city of New York, and that it has at all times borne true faith and loyalty to the Government of the United States and has not in any way aided or abetted or given encouragement to rebellion against the said Government.

II. The Congress of the United States, by act of March 3d, 1899, authorized the following:

"Hereafter the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to procure any of the stamps provided for in the act entitled 'An act to provide ways and means to meet war expenditures and for other purposes,' approved June 13th, 1898, by contract, whenever such stamps can not be speedily prepared by the Bureau of Engraving and Printing and said contracts shall be awarded under such terms, restrictions, and regulations as may be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury."

2 III. That subsequently and in pursuance of said act, the said Bureau being unable to prepare said stamps, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, prescribed certain terms, restrictions, and regulations, and which were to be included in and made part of said contracts, which are more fully set forth and contained in a preliminary contract entered into by and between your petitioner and defendant, a copy of which is hereto annexed, marked "Exhibit A" and made part of this petition.

IV. That at the time therein mentioned, that is to say, the twenty-fifth day of April, 1899, your petitioner was engaged in imprinting stamps, under contract with the Government.

V. That subsequently and on the twenty-fifth day of May, 1899, a contract was awarded to your petitioner by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for the imprinting of stamps, a copy of which is hereto annexed, marked "Exhibit B," and made part of this petition.

VI. That by accident and mistake mutual and common to both parties thereto and admitted, the said contract does not conform to the terms of their agreement, nor to the intention of the parties, in that it omitted to state that—

"No application for contract to imprint stamps for period named will be considered from any person, firm or corporation not engaged in imprinting stamps on the 25th day of April, 1899, under contract with the Government."

And further that it omitted to state that applications for said contracts shall not be received by the Commissioner of Internal Revenue after 12 m. on the 25th day of May, 1899.

3 VII. That thereafter and several weeks after the said twenty-fifth day of May, and in violation of said contract, the said defendant did receive from and grant an application for a similar contract to the American Imprinting Company, a corporation not engaged in the imprinting of stamps under contract with the Government on the 25th day of April, 1899.

VIII. That the said American Imprinting Company became composed of persons engaged in the stationery business and who required the imprinting of a very large number of stamps on bank checks, etc. That at the time mentioned, May 25th, 1899, and for a long period prior thereto, the larger number of those constituting the said American Imprinting Company had required their business, as aforesaid, to be done by your petitioner, with which they were in every way satisfied and which they would have continued had it not been for the contract granted to them as aforesaid by the defendant, in violation of its contract with your petitioner. That by reason of the loss of business and otherwise thereby occasioned to your petitioner by the wrongful act of the defendant your petitioner was damaged in the sum of eighty-six thousand seven hundred ($86,700.00) dollars, as appears more fully from the bill of particulars hereto annexed, marked "Exhibit C" and made part of this petition. That there has been no assignment or transfer of said claim or any part thereof or interest therein, and that said claimant is justly entitled to the amount therein claimed from the United States, allowing all just credits and offsets.

Wherefore your petitioner prays judgment against the United States that said contract be reformed so as to express the actual agree-

4 ment and intention of the parties thereto, by adding and making a part thereof the following words:

"And it is further agreed by and between the parties hereto that the party of the first part shall not receive, consider, or grant, and has not received, considered, or granted any application for a similar contract to imprint stamps as hereinbefore described and provided from any person, firm, or corporation which was not actually engaged in imprinting said stamps under contract with the party of the first part on the 25th day of April, 1899."

And your petitioner prays further judgment against the United States in the sum of eighty-six thousand seven hundred ($86,700.00) dollars, and for such other and further relief as it may be entitled to.

MILLIKEN IMPRINTING COMPANY,
By DAVID MILLIKEN, Jr., *President.*

DISTRICT OF COLUMBIA, *ss:*

I, David Milliken, jr., being duly sworn, do depose and say that I am the president of the Milliken Imprinting Company, a corporation, which corporation is named as party complainant in the annexed petition; that I have read said petition and know the contents thereof, and that the facts therein stated are true, to the best of my knowledge, information, and belief.

DAVID MILLIKEN, Jr.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Subscribed and sworn to before me, a notary public in and for said District, this 10th day of December, A. D. 1903.

[SEAL.] CLARENCE E. DAWSON.

5 EXHIBIT A.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 25, 1899.

To contractors for imprinting stamps:

In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps.

Each contractor will be required to pay salaries aggregating thirty-four hundred dollars ($3,400) per annum for one government stamp agent and two counters, payable monthly.

As compensation in full for imprinting stamps, the contractor shall charge all persons requiring the same the sum of eighty cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and one dollar per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet. In order to secure absolute uniformity in prices these charges shall be rigidly adhered to, and any evasion or attempted evasion of the express terms hereof shall be deemed a violation of the terms of the contract.

No application for contract to imprint stamps for period named will be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government.

Each application for contract must be accompanied by the guarantee of at least two responsible persons, that in case contract is entered into and accepted, bond will be furnished in the sum of twenty-five thousand dollars ($25,000) for the faithful performance thereof.

The Commissioner reserves the right to reject any or all appli-
6 cations and to cancel any contract wherever and whenever it shall appear to the interests of the public and the Government to do so.

Applications will be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until 12 m., May 25, 1899, such applications to be carefully sealed and marked "Applications for contract for imprinting internal revenue stamps" and addressed to the Commissioner of Internal Revenue.

G. W. WILSON,
Commissioner.

EXHIBIT B.

Contract for imprinting internal revenue stamps on checks, drafts, and orders.

This contract, made in duplicate, and entered into this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, by and between the United States of America, by G. W. Wilson,

Commissioner of Internal Revenue, party of the first part, and the Milliken Imprinting Company, of the city of New York, State of New York, party of the second part,

Witnesseth, That the said party of the second part, for the consideration hereinafter mentioned, hereby covenants and agrees to print from plates furnished to an authorized agent of the Government internal revenue stamps of the denomination of two cents, or such other denominations as may be required by law, upon such blank checks, drafts, certificates of deposit or orders, drawn upon or issued by any bank, banker, trust company, or other person, firm or corporation, or upon such other documents as may be offered for that purpose by the public, and to pay the cost of renewing, whenever it may be necessary, any of the plates approved and furnished for the purpose aforesaid.

7 And the said party of the second part further agrees that the plates for which the stamps herein contracted for are to be printed shall be kept bright and sharp, new and additional designs or plates shall be made or changed at its expense, at the pleasure of said Commissioner of Internal Revenue, and that all plates which may be furnished in anticipation of this agreement, or may be made under the operations thereof, shall be and remain the property of the United States.

And it is further agreed by the party of the second part that the consideration to be received by it for the undertaking herein stipulated to be by it performed, shall be such compensation as may be received from the persons, firms, or corporations who may present checks, drafts, orders, or documents, for the purpose of having stamps imprinted thereon, and the amount so received shall be the sum of eighty cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and one dollar per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet; and the said party of the second part covenants and agrees that the consideration herein provided for shall be in full satisfaction for all and singular the undertakings to be by it performed, and the operations of this contract, including the cost of engraving and reengraving all new and additional designs and plates that may be required from time to time in the conduct of said printing, the expenditure for superintending and counting the stamps as herein provided, and all other expenses connected with the printing of said stamps as aforesaid.

And it is further agreed that no stamps shall be imprinted in the manner aforesaid, except upon the requisition of the Commissioner, or a collector of internal revenue, or authorized agent of the Government, and under the regulations of the Commissioner of Internal Revenue, and that all printing provided for in this agreement shall be under the

8 immediate personal supervision and control of the agent of the Government stationed in the establishment; that the receipt of the checks and papers upon which the stamps are to be imprinted, and the printing and delivery of the stamps, shall be conducted in a room or rooms exclusively devoted to that purpose, and in communication with the office of the agent, and the entrance or entrances to said room or rooms shall be under the exclusive control of said agent.

And the said party of the second part further agrees that it will not afford any information to one person, firm, or corporation, presenting

instruments to be stamped, relative to the work to be done for another person, firm, or corporation, nor will any advantage be afforded to one person, firm, or corporation, over another person, firm, or corporation, as to the order in which, price at which, or expedition with which, stamps are imprinted. That all stamps shall be printed at the price herein named without discount or rebate, and only upon checks, drafts, orders, or other documents delivered entirely at the expense of the persons, firms, or corporations presenting the same.

And it is further agreed that said party of the second part shall furnish without cost to the Government a suitable and sufficient room in the establishment where the stamps herein referred to are printed, to be used as an office by the agent of the Government to be designated by the Commissioner of Internal Revenue, the same to be supplied with appropriate furniture and fixtures, and shall also provide without cost to the Government an iron fire and burglar proof safe or vault, the same to be placed at the disposal of said agent, who shall make use thereof for the purpose of the safe-keeping of the stamps while in his possession, and all plates used in the imprinting of the stamps provided for in this contract.

9 And it is further agreed that the plates which may be furnished under the operations of this agreement shall continually be in the custody of said agent of the Government, and at the termination of said contract, or whenever any of the said plates shall become so worn as to be unfit for use, or, by reason of a change in the design, may no longer be required, they shall be delivered to the Commissioner of Internal Revenue:

And the said party of the second part further agrees to produce and deliver such good and perfect stamps as may be ordered as herein provided, without charge to said party of the first part, and to keep the same until delivered by the direction of the said Commissioner of Internal Revenue, a collector, or agent of the Government, in a place which is safe against fire and burglars, provided that such stamps shall, until delivered, be in the joint custody of the agent of the Government and of the party of the second part:

And the party of the second part is required, and further agrees to reimburse the expenditure for superintending and counting the stamps, as herein provided, at the rate of thirty-four hundred dollars ($3,400) per annum, viz: Sixteen hundred dollars ($1,600) for the agent's salary, and nine hundred dollars ($900) each for the salary of two counters, such reimbursement to be made monthly under the direction of the Commissioner of Internal Revenue:

And it is further agreed that the party of the second part shall, under the direction and supervision of the said agent, at its own expense and charge, pack in a proper manner for shipment all checks, drafts, orders, or documents upon which stamps are imprinted by them and ship the same at the expense and according to the direction of the person, firm, or corporation that presented them:

10 And it is further agreed that the stamps herein contracted for shall be printed exclusively at the printing establishment of the party of the second part, in the city of New York and State of New York.

This contract shall commence on the first day of July, A. D. 1899, and shall subsist and continue for the period of one year from that date,

unless sooner terminated, as hereinafter provided; and it is further mutually agreed by and between the party of the first part and the party of the second part that this contract may be terminated at any time by the Commissioner of Internal Revenue upon thirty (30) days' notice in writing: Provided that the same may be terminated at any time by the Commissioner without notice, for cause satisfactory to himself; and provided further that the said party of the second part shall have the right to terminate this contract, upon giving to the Commissioner of Internal Revenue notice of said intention in writing sixty (60) days prior to the intended termination thereof.

In witness whereof, the said G. W. Wilson, in his capacity of Commissioner of Internal Revenue, acting for and in behalf of the party of the first part, hereunto affixes his signature; and the said Milliken Imprinting Company, party of the second part, hereunto affixes its signature and seal.

G. W. WILSON,
Commissioner of Internal Revenue.

MILLIKEN IMPRINTING COMPANY, [SEAL.]
By DAVID MILLIKEN, Jr.,
President Milliken Imprinting Company.

E. C. JOHNSON,
JNO. T. BIVINS,
Witnesses to signature of Commissioner.

BENJAMIN F. REESE,
WALTER H. MCILROY,
Witnesses to signature of Milliken Imprinting Company.

11 EXHIBIT C.

Bill of particulars.

Amount of loss on business and orders from—

Corlies, Macy & Company, of New York, about	$10,000.00
Wilbur & Hastings, of New York, about	10,000.00
Dennison & Sons, of New York, about	10,000.00
Stewart, Warren & Company, of New York City, about	12,000.00
Brown, Lent & Pett, of New York City, about	8,000.00
Milton C. Johnson & Company, of New York City, about	10,000.00
William Mann Company, of New York, about	14,000.00
J. H. Warner, of New York City, about	6,000.00
Styles & Cash, of New York City, about	6,000.00
	86,000.00
One printing press, about	700.00
	86,700.00

Your petitioner further specifies and particularizes that each of abovenamed firms, persons, and corporations exclusively patronized your petitioner prior to the granting by defendant of said contract to the American Imprinting Company, and after which your petitioner lost their orders and business by reason of their interest in and composition by themselves of said American Imprinting Company.

Above estimates approximated on basis of their actual business done between July 1, 1899, and July 1, 1900, during continuance of petitioner's contract.

13 II.—*Amended petition.—Filed March 8, 1904.*

In the United States Court of Claims.

THE MILLIKEN IMPRINTING COMPANY, CLAIMANT,
v.
THE UNITED STATES. } No. 24574.

Amended petition.

To the Honorable the Judges of the United States Court of Claims:

Your petitioner, the Milliken Imprinting Company, would respectfully ask leave to amend its petition filed herein by adding to Paragraph V thereof the following words: "and subsequently executed for a valuable consideration," and also: "and accepted by your petitioner without examination or reading upon the assurance by a representative of defendant that it contained all the provisions of the preliminary contract," so as to make the said Paragraph V, as amended, read as follows:

"That subsequently and on the 25th day of May, 1899, a contract was awarded to your petitioner by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for the imprinting of stamps, and subsequently executed for a valuable consideration, a copy of which is hereto annexed and marked 'Exhibit B' and made part of the petition, and accepted by your petitioner without examination or reading upon the assurance by a representative of defendant that it contained all the provisions of the preliminary contract."

And your petitioner would further ask leave to amend by adding to Paragraph III of its petition the following:

14 "That your petitioner accepted in writing the terms, restrictions, and regulations contained in the defendant's communication, Exhibit A, a copy of which acceptance is hereto annexed, marked 'Exhibit D,' and made part of this petition."

And would amend its bill of particulars so as to read as follows:

"Amount of loss on business and orders from Stewart Warren & Co., of New York City	$87,422.56
Brown, Lent & Pett, "	2,177.48
J. H. Warner, "	2,930.47
Styles & Cash, "	1,775.48
William Mann Co., New York City and Philadelphia	4,564.00
Milton C. Johnson & Co., of New York city	4,000.00
	$22,869.99
From which is to be deducted the expense of doing the amount of business lost had it been done by claimant, amounting to	2,285.00
Leaving amount of claimant's damages for loss of profits.	$20,584.99
To which is to be added the cost of one press	500.00
Making the total amount of claimant's damages	$21,084.99"

And your petitioner would further amend its petition by adding to its prayer for relief the following words: "damages for breach of said contract as reformed," and by making the amount of petitioner's damages the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99), so that its prayer for relief as amended shall read as follows:

15 "And your petitioner further prays judgment against the United States in the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents damages for breach of said contract as reformed, and for such other and further relief as it may be entitled to."

"MILLIKEN IMPRINTING COMPANY,
"By DAVID MILLIKEN, Jr., *President.*"

CITY AND COUNTY OF NEW YORK, *ss:*

I, David Milliken, jr., being duly sworn, do depose and say that I am the president of the Milliken Imprinting Company, a corporation, which corporation is named as party complainant in the annexed petition; that I have read the said amendments to the petition, and that the facts therein stated are true to the best of my knowledge, information, and belief.

DAVID MILLIKEN, Jr.

Subscribed and sworn to before me, a notary public in and for the County of Kings, this 1st day of March, 1904.

E. W. STARR,
Notary Public, Kings County.

Certificate filed in New York County.

EXHIBIT D.

Authorized to imprint stamps on bank checks, drafts, etc.

[David Milliken, jr., & Company, 22 Thames street. Telephone 1590 Cortlandt.]

NEW YORK, *May 25, 1899.*

HON. GEORGE W. WILSON,
Commissioner of Internal Revenue.

SIR: We have now the privilege conferred by the honorable Commissioner of Internal Revenue to imprint stamps on checks, drafts,
16 etc., and would most respectfully make application to you for a contract to continue the same for the period of one year, commencing July 1, 1899, and in accordance with your official communication dated April 25, 1899, we to pay salaries aggregating thirty-four hundred dollars for one Government stamp agent and two counters, and to receive as compensation for imprinting stamps the sum of eighty cents per thousand when imprinted upon sheets containing five or more stamps and one dollar per thousand when imprinted upon sheets containing less than five stamps to the sheet.

We beg to attach guarantee of American Surety Company of New York, to furnish the required bond in the sum of $25,000 for the faithful performance of the contract, and to respectfully refer you to letters filed in your office in June, 1898, and which accompanied our application for

the original contract as to our standing and integrity. We have the honor to be,

Yours, very respectfully,

DAVID MILLIKEN, Jr., & Co.

17 III.—*Traverse.—Filed November 7, 1904.*

In the Court of Claims of the United States. December term, A. D., 1904–5.

THE MILLIKEN IMPRINTING COMPANY
vs.
THE UNITED STATES. } No. 24574.

And now comes the Attorney-General, on behalf of the United States, and answering the petition and amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

18 III½.—*Argument and submission.*

This cause was argued and submitted on the 7th day of November, 1904.

19 EVIDENCE FOR CLAIMANT.

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EVIDENCE FOR DEFENDANTS.

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DAVID MILLIKEN,
Attorney for claimant.

The deposition of David Milliken, for claimant, taken at New York City on the 17th day of February, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, John H. Hazelton.

DAVID MILLIKEN, recalled on behalf of the claimant, further deposes and says:

I desire to correct my testimony on page 12, where it appears that it was after I received the contract in duplicate that I did not consider that the omitted provisions related directly to the subject-matter of the contract. What I meant was that it was at the time I made application for the contract. In my letter of acceptance, as it appears, it was made in

accordance with the circular letter of April 25, 1899, and the matters specifically mentioned by me were only those which I claim I was obligated to do.

The claimant has always been loyal to the Government.

20 The Congress of the United States, by the act of March 3, 1899, authorized the Commissioner of Internal Revenue to procure the imprinting of stamps by contract, upon such terms, restrictions, and regulations as he might see fit, to be approved by the Secretary of the Treasury. His circular letter, under date of April 25, 1899, containing those terms, restrictions, and regulations, was approved by the Secretary of the Treasury. The mistake claimed by the claimant in the contract was the omission to state that no application for a contract would be received from any person, firm, or corporation not engaged in printing stamps under contract with the Government on the 25th day of April, 1899; and further, that no application for a contract would be received after 12 o'clock on the 25th day of May, 1899. The claimant paid a valuable consideration to the defendants for its contract in the sum of $3,400, which was $900 in addition to the consideration of the previous contract. This $900 additional consideration was a special consideration for the restriction of the contract. The claimant had built up its business during the period covered by the first contract, and maintained it at considerable expense and cost occasioned by the cutting in prices by the other contractor in the same territory. This cutting of prices was not prohibited by the contract. That there was only one competitor of the claimant in the city of New York, which was the Franklin Lee Bank Note Company.

The claimant's plant consisted of four large double presses, one small press, and one pony press. During the entire year from July 1, 1899, to July 1, 1900, two of the larger presses were idle all the time and one of the small ones was only occasionally in use. To have done the amount of business which claimant claims he lost by reason of the contract to the American Imprinting Company would have involved the additional expense of two feeders, costing $1,032; one pressman, costing $903; additional rollers, costing $100; ink, costing $50; additional power, costing $200; making, in all, $2,285.

The total amount of business which the claimant claims was lost to it by reason of the contract to the American Imprinting Company was 28,587,509, number of stamps which, at 80 cents per thousand, the contract price, made claimant's loss in money $22,869.99, from which is to be deducted the sum of $2,285, which would have been the expense of doing that additional amount of work, leaving the sum of $20,584.99 as the amount of claimant's damages from loss of business.

In addition, claimant provided an additional press to meet the requirements of increase of business, at a cost of $700, which became useless and was disposed of for $200, thus making the total damages claimed by claimant $21,084.99, after allowing all just credits and offsets.

There has been no assignment or transfer of said claim, or any part thereof, or interest therein.

The contract entered into by the claimant with the defendants was with the approval of the Secretary of the Treasury, and the restrictions of the contracts to those who had them and the limitation of time within

which application should be made, constituted the principal inducement to the claimant to make its contract.

I desire to correct my testimony on page 12, where I say I did not make reference in my letter of acceptance to the restriction of the contracts because I did not consider it related directly to the subject-matter of the contract. That I did not mean, for I always considered the
21 restriction as bearing so directly upon the contract that I would not have made it without it. My conduct has always been consistent upon that point, and from the first knowledge of the defendants' disregard of it, and ever since, I have claimed it to be a violation of the contract.

Mr. HAZELTON. Being unfamiliar with the testimony formerly given by the witness in this case, I will ask that this deposition be held open for a reasonable time until I can advise myself.

The cross-examination of the witness is therefore adjourned, subject to the future arrangement of counsel.

Pursuant to agreement of counsel, David Milliken, jr., appeared before me this 1st day of March, 1904, and his cross-examination was continued by Mr. Hazelton, as follows:

73. Cross-question. I wish you would explain a little more fully in just what way you desire to correct your testimony on page 12. You will notice that you say "What I meant was that it was at the time I made application for the contract." Just what do you mean?

Answer. What I mean is that the time when I considered that the restrictions did not relate to the subject-matter of the contract was when I made the application for the contract, and not when I received the contract in duplicate.

Mr. HAZELTON. I ask to have stricken out the statement of the contents of the act of March 3, 1899, as incompetent. The act speaks for itself. And I ask to have stricken out the statement that the letter of April 25, 1899, was approved by the Secretary of the Treasury, as incompetent. The letter speaks for itself.

74. Cross-question. I wish you would explain what you mean by the statement, "The claimant paid a valuable consideration to the defendant for its contract in the sum of $3,400, which was $900 in addition to the consideration of the previous contract." How do you make out this payment to be a consideration; and this question is without prejudice to the incompetency of any testimony on your part to vary the written agreement?

Answer. We were required by the Government under our first contract to pay the Government the sum of $2,500 in monthly payments.

75. Cross-question. You mean David Milliken, jr., & Co., was required?

Answer. Yes, sir; required by this contract to pay the Government the sum of $2,500 a year in monthly payments. The second contract made to the claimant, this amount was increased $900, making $3,400.

76. Cross-question. What I want to know is, How do you make that as a consideration? Wasn't this money paid simply to provide for the expenses of supervising your work?

Answer. It read so in the contract, but I do not know what the Government did with the money. We paid the money directly to the Government. We did not pay any salary with it; the money was paid directly to the Government.

77. Cross-question. Without prejudice to your incompetency to vary the written agreement, I will ask you if you agree with the statements of Mr. Johnson in this case, so far as you know the facts, that the additional counter at $900 a year salary was provided for in order that possibly some of those having contracts for the year 1898-99, by this additional expense thus put upon them, would be deterred from asking for a new contract, and in order that some of the large imprinting establishments might have sufficient supervision—that is, that the practical results of such increase to cover such salary would be these?

22 Answer. I know that the object in increasing the money to be paid to the Government $900 a year was to deter some of those who had contracts from renewing them. I have no information that additional supervision was required by any of the contractors. I did not require it, and the additional counter that they put in my place was idle all the time during the entire year; there was not a thing for him to do.

78. Cross-question. You did not have much business during the following year when this new counter was there, did you?

Answer. Oh, yes, I had quite a large business; there was $3,000 or $4,000 of profits on the year's business, but I did not have any necessity for the additional counter.

79. Cross-question. Did the Milliken Imprinting Company do as much work per month under its contract as was done per month, respectively, by the David Milliken, jr., & Co., during the previous year?

Answer. I can not state positively; I have not the figures of the work done by David Milliken, jr., & Co., but I think from the natural increase of the business that the Milliken Imprinting Company did more business per month than the David Milliken, jr., & Co.; but I can not state by a comparison of figures covering that year. I have the figures of the Milliken Imprinting Company, but not the figures of the David Milliken, jr., & Co.

80. Cross-question. Then the Milliken Imprinting Company had as much work as the David Milliken, jr., & Co. had had?

Answer. Yes; I think more, but I can not say positively.

81. Cross-question. Without waiving the incompetency of such testimony, I would like to ask if there is anything in the written contract, or if anything was said by an officer of the Government at the time or previous to the execution of the contract here in question, that the $900 going to this additional counter was a special consideration passing from the Milliken Imprinting Company to the Government, for which the Government agreed not to make any contracts for the year 1899–1900, except with companies having contracts during the previous year?

Answer. No; nothing was said about that specifically. The statement was that the number of contractors was sought to be reduced by restricting the contracts to those who had them and in the increase of $900 to be paid to the Government.

82. Cross-question. Under the same provision as to nonwaiver, I will ask you who made this statement?

Answer. It was made by the Commissioner of Internal Revenue and Mr. Johnson. It was made personally to me.

83. Cross-question. That is, the Government, as you understand it,

thought that the practical result of requiring the proposed new contractors to pay for an additional counter would result in deterring many from asking a new contract?

Answer. That was the object in making the increased payment to the Government.

84. Cross-question. Referring to your statement, "The claimant's plant consisted of four large double presses, one small press, and one pony press." Did these originally belong to David Milliken, jr., & Co.?

Answer. Yes.

85. Cross-question. And were they sold to the Milliken Imprinting Company in July, 1899, or what is there about that?

23 Answer. There was no transfer at all; they were exactly the same parties; there never was any transfer from the David Milliken, jr., & Co. to the Milliken Imprinting Company.

86. Cross-question. You simply carried on the business under a different name—by the same persons?

Answer. Yes, sir; there was no liability on the part of the company; its only obligation was to pay to the Government the sum required by the contract, and that was secured to the Government by bond, and the company did no other business but print stamps under the contract.

87. Cross-question. When were these presses purchased?

Answer. In 1898.

88. Cross-question. All of them?

Answer. No; all but the one described as the "small" press, which was purchased subsequent to the execution of this contract in this suit, in expectation of largely increased business.

89. Cross-question. Were all of these presses used constantly for the business of the David Milliken, jr., & Co. during the previous year, or were they not necessary?

Answer. It would be difficult to answer that, because the condition of the business varied owing to the cutting in prices, which at times made the business very active and at other times entirely destroyed it, so to speak. At times during the previous year all the presses were in operation, and again at times none of them was in operation, owing to the variation in the condition of business caused by the cutting of prices.

90. Cross-question. Please state why you purchased the "small" press.

Answer. By reason of the price to be charged for imprinting the stamps having been made uniform and fixed by the Government, I was assured, by stationers other than the ones whose testimony has been given here, of a very largely increased business, to meet the requirements of which I arranged to provide three additional presses, one of which had been put up on my floor, and the other two had not been delivered before the contract was made to the American Imprinting Company, which contract prevented my receiving the increased business which I expected, and I succeeded in getting rid of the two new presses ordered, but was required to take the third one, which I describe as a "small" press.

91. Cross-question. When David Milliken, jr., & Co. started business you and the other members of course knew that the imprinting of stamps would continue only so long as the Government continued in force the revenue law requiring such stamps?

Answer. Yes.

92. Cross-question. And that its continuation therefore was uncertain?
Answer. Yes.
93. Cross-question. Where you say in your testimony that you provided an additional press, at a cost of $700, etc., that is the abovementioned "small" press, is it?
Answer. Yes.
94. Cross-question. How did you dispose of that; to whom and under what circumstances?
Answer. I sold my entire plant—that is, including the presses and the shafting—back to the firm from whom I bought it. It cost
24 me somewhere, I think, in the neighborhood of $13,000 or $14,000, the whole thing, for which I received $2,000.
Mr. HAZELTON. I ask to have stricken out the following statement as incompetent: "The contract entered into by the claimant with the defendant was with the approval of the Secretary of the Treasury, and the restrictions of the contracts to those who had them and the limitation of time within which application should be made constituted the principal inducement to the claimant to make its contract."

DAVID MILLIKEN.

Deposition of John E. Stewart, for claimant, taken at the city of New York on the 10th day of February, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, John H. Hazelton.

JOHN E. STEWART, sworn by the notary as a witness for the claimant, testifies as follows:

Direct examination by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.
Answer. John E. Stewart; age, 63 years, and I reside in Plainfield, N. J.
Question. And you are a member of the firm of Stewart, Warren & Co.?
Answer. I am.
Question. What is the business of that firm?
Answer. Manufacturing stationers.
Question. Do you know the claimant in this action, the Millikin Imprinting Company?
Answer. I do.
Question. And did your business as manufacturing stationers require the use of revenue stamps under the act of Congress in the Spanish-American war?
Answer. Yes, sir.
Question. And you had the stamps imprinted on the checks you furnished?
Answer. Yes sir.
Question. Did you employ for that purpose the claimant, the Milliken Imprinting Company, in this action?
Answer. Yes, sir.
Question. During what time, can you recall it, when it first went to them?

Answer. I have not that data with me at the moment; but when I stop to think I can recall; it was about September, 1898.

Question. Until what time?

Answer. I think until July, 1899. Of course, I could tell you exactly by looking at my books—I could give it exactly.

Question. During that entire period of time you employed the claimant in this action, the Milliken Imprinting Company, to print the revenue stamps on checks?

Answer. Yes, sir.

Question. What was the condition of the work done for you by the claimant—was it in every way satisfactory?

Mr. HAZELTON. I object to that as immaterial unless that is the contract on which this present suit is brought, and I understand it is not.

Mr. MILLIKEN. This is upon the question of damages; that is all.

Question. You were perfectly satisfied with the work they did for you?

Answer. We were; yes, sir.

Question. In every way?

Answer. Yes, sir.

Question. Are you familiar with the terms of the contract for the year beginning July 1, 1899, to the 1st of July, 1900? I mean the contracts made in the city.

Answer. Do you mean the terms imposed by the Government for the job?

Question. Yes.

Answer. Yes, sir; there was an arbitrary rate fixed.

Mr. HAZELTON. I ask to have the last portion of that answer stricken out as irresponsive.

Question. You say you are familiar with the terms of the contract?

Answer. Yes, sir.

Question. Are you familiar with the provisions of that contract regarding the price to be charged for the work done?

Answer. On July 1, 1899?

Question. Yes.

Answer. Yes, sir.

Question. What was that price?

Answer. One dollar per thousand.

Question. That price was fixed by the Government arbitrarily, was it?

Answer. Yes, sir.

Mr. HAZELTON. I object to that testimony if it varies the contract.

Mr. MILLIKEN. No; that is in the contract.

Question. That price having been fixed, it was therefore the same in all contracts, was it not?

Mr. HAZELTON. I object to that question unless the witness has seen all the contracts; I think you are asking something he can not possibly know about.

Mr. MILLIKEN. Then I will withdraw the question.

The WITNESS. My answer would be, so far as New York City is concerned—of course, the general impression is it was the same throughout the city, but I can not say from personal knowledge now.

Question. As to New York City, then, to your own knowledge the contracts were uniform as to price?

Answer. Yes, sir.

Question. Therefore, no advantage could be given by one contractor to the users of revenue stamps over another?

Mr. HAZELTON. Same objection. The contracts speak for themselves.

Answer. No, sir.

Question. When did you cease sending your work to the claimant, the Milliken Imprinting Company?

Answer. I can only say about the time. I can not tell positively the date without going to the office, but it was when the American Imprinting Company began business.

26 Question. Were you a member of the American Imprinting Company?

Answer. Yes, sir.

Question. You were one of the organizers of it, were you not?

Answer. Yes, sir.

Question. What was the purpose of that organization?

Answer. It was for the purpose of imprinting revenue stamps upon checks.

Question. For yourself, was it not?

Answer. Ourselves and others.

Question. Then if it had not been for the contract of the American Imprinting Company, would you have continued to send your work to the Milliken Imprinting Company?

(Objected to as immaterial and incompentent.)

Answer. Yes, sir.

Question. And that was the sole reason why you transferred your business from the claimant company to the American Imprinting Company?

(Same objection.)

Answer. Yes, sir.

Question. What was the total number of stamps you imprinted during the year July 1, 1899, to July 1, 1900?

(Objected to as immaterial and incompetent to show damages under the contract sued on.)

Answer. 9,278,207.

Question. Were there any trade reasons that induced you to send your work to the claimant in this action?

Answer. I do not know as I understand your question. You mean originally, do you?

Question. Yes; originally, of course.

Answer. I can explain why we sent it to you—to the claimant in this action. We were very much dissatisfied with——

Question. What was the reason you had for sending the business to the claimant originally?

Answer. We were dissatisfied with the work done by the other contractor whom we first employed.

Question. (By Mr. HAZELTON.) Who was that?

Answer. The Franklin Lee Bank Note Company.

Question. The object of the American Imprinting Company was to do the work for the members who constituted that company, was it not?

Answer. Yes; primarily, for them and anyone else who chose to give their work to the company.

Question. And you have no interest in this suit at all, have you?

Answer. No, sir; I have not.

Cross-examination by Mr. HAZELTON:

Question. The memorandum of figures that you have given—how did you get those?

Answer. From my books.

Question. And just what do they represent?

Answer. They represent the number of checks imprinted.

Question. During what period?

Answer. From July, 1899, to July, 1900.

Question. By the American Imprinting Company?

27 Answer. Yes, sir.

Question. Not by the claimant at all?

Answer. No, sir.

Question. Did the claimant do any work for you after July, 1899.

Answer. I could not say without referring to the books. I presume they did, for the reason——

Question. I do not want your presumption, if you do not know. You do not know; is that the idea?

Answer. I do not know without referring. I can tell. We have a record of all these things. If we gave them anything at all it was where we were directed to do so by our customers—that is, we frequently receive requisition on the collector in New York drawn by the internal-revenue collectors in New England States, in which they designated the stamp printer.

Question. Then, under the contract on which this suit is based, you did nothing of your own volition toward employing the claimant?

Answer. No, sir.

Question. All that it did for you was done under the previous contract; that is, the contract for the year previous?

Answer. Yes, sir; it is just possible that after the American Imprinting Company decided to go out of business they may have done something. That is the impression in my mind—I could not say without referring to the books—but we absolutely shut off all business when the American Imprinting Company was ready for business.

Question. So, when you say that the claimant's work was perfectly satisfactory to you, you refer to its work under the contract for the year previous?

Answer. Yes, sir.

Question. The contract upon which this suit is based?

Answer. As long as we were in business with the claimant.

Question. Just what was the nature of this organization—the American Imprinting Company—was it a corporation?

Answer. It was a corporation formed for the sole purpose of imprinting stamps on checks.

Question. And you were a stockholder in that corporation?

Answer. Yes, sir.

Question. And an officer and director?

Answer. I believe I was vice-president; I was not an active officer.

Question. Do you mind answering how much stock you had—what proportion of the stock?

(Objected to as immaterial.)

Answer. I think I held $500 of the stock.

Question. Can you state how much stock there was in all?

Answer. I can not.

Question. Did you have any salary?

Answer. No; the details of all that matter have gone out of my mind. I have dismissed it.

Question. Did the imprinting of stamps in the course of your business by the American Imprinting Company cost you the same that it would have cost you had you had the Milliken Imprinting Company imprint for you during the year 1899 to 1900, under the contract here in suit?

(Objected to.)

Answer. No.

28 Question. Did it cost you less?

Answer. We naturally would make some profit in the business.

Question. And that was the reason you formed the new company?

Answer. Yes, sir.

Question. In order to have the profit that the Milliken Imprinting Company would otherwise have reaped?

Answer. Yes, sir.

Question. How did you get the customers for the American Imprinting Company?

Answer. I can not tell you that, except so far as the stockholders were concerned; they were like ourselves, in the business.

Question. And, of course, each one of them transferred to the company all of their business?

Answer. Yes, sir.

Question. And I suppose each of those persons had an interest in the business, as you did?

Answer. Certainly; they were stockholders.

Question. And they got their imprinting cheaper than the Milliken Imprinting Company would have done it?

Answer. Exactly.

Question. So it was to the interest of all you people to get customers for the American Imprinting Company?

Answer. Naturally, it would be. I do not know as any effort was made. I could not say. I know nothing about the inside workings of the American Imprinting Company.

Question. You mean you had no connection with the management of the business?

Answer. No, sir. I was absent a good deal of that period, too. I only know that we sent all our business there religiously.

Question. These figures that you have given are the figures of work done for your firm by the American Imprinting Company during that year?

Answer. That is what I understand—yes, sir.

Question. And what amount of business was done by the Milliken Imprinting Company for you—that is, for your firm, following July 1899?

Answer. I will have to refer to the books for that.

Question. I will ask you to find out from your books and state just what business was done by the Milliken Imprinting Company for your firm under the contract here in suit—that is, from July, 1899, to July, 1900.

Answer. 21,202.

Redirect by Mr. MILLIKEN:

Question. What did you pay the American Imprinting Company for doing your printing of stamps?

Answer. Eighty cents per thousand.

Question. The American Imprinting Company?

Answer. Yes, sir.

Question. That was the same price charged by the Milliken Imprinting Company, was it not?

Answer. It was the uniform rate fixed by the Government.

Question. The profit that you referred to as having been made by sending your work to the American Imprinting Company you derived as a stockholder, did you not?

29 Answer. Yes, sir.

Question. And only as a stockholder?

Answer. I think so—as a stockholder.

Question. You had no reduction from them from the price 80 cents per thousand?

Answer. No, sir.

By Mr. HAZELTON:

Question. But this corporation was formed for the express purpose of carrying on this business?

Answer. Yes, sir.

Question. And for the express purpose of paying the Milliken Imprinting Company a share of the profits?

Answer. No, sir; we had no member of that Milliken Imprinting Company in it. It was done for our own profit.

By Mr. MILLIKEN:

Question. The American Imprinting Company was composed of stationers, was it not?

Answer. Yes, sir.

Question. Do you know of anything further, or have you any information about this matter that is material to the issues here, in favor of or against either of the parties?

Answer. No, sir.

It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Milliken Imprinting Company" or "the claimant" or similar expressions should read "David Milliken, jr., & Co."

JOHN E. STEWART.

Deposition of Hersey Brown, for claimant, taken at the city of New York on the 10th day of February, A. D. 1904.

Claimants' counsel, David Milliken; defendants' counsel, John H. Hazelton.

Direct examination by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.

Answer. Hersey Brown; age 56 years, and I reside at No. 8 Clark street, borough of Brooklyn, New York City.

Question. You are a member of the firm of Brown, Lent & Pett, New York City?

Answer. Yes, sir.

Question. And what is their business?

Answer. Manufacturing stationers.

Question. Did you require the printing of revenue stamps upon bank checks which was made necessary under the act of Congress in the Spanish-American war?

Answer. Yes, sir.

Question. And you had these stamps printed on checks, did you not?

Answer. Yes, sir.

Question. Who did that work for you during the year July 1, 1898, to July 1, 1899?

30 Answer. David Milliken, jr., or the Milliken Imprinting Company.

Question. You sent all your business to them, did you not—about all of it?

Answer. Yes; the largest share of it. We sent some during that time to the Franklin Lee Company.

Question. But having begun your business with the Milliken Imprinting Company, did you send most of it to that company?

Answer. We sent it all to you—to the Milliken Imprinting Company.

Question. And were you entirely satisfied with the work done by them?

(Objected to as immaterial.)

Answer. Yes, sir.

Question. When did you discontinue sending your business to them?

Answer. It was about July, 1899. I can tell you from this [referring to paper].

Question. What was your reason, if you can recall, if you had any, for discontinuing work with them at that time?

Answer. Because we turned the work in to the American Imprinting Company.

Question. You were a member of the American Imprinting Company?

Answer. Yes, sir; our firm was.

Question. Your firm was?

Answer. Yes, sir.

Question. What was the object of the American Imprinting Company?

Answer. It was to print the stamps and make thereby a saving; joining with them and saving some money.

Question. Making the profit on the work yourself?

Answer. Yes; making the profit on the work ourselves.

Question. If it had not been for the contract with the American Imprinting Company, would you have continued to send your work to the Milliken Imprinting Company?

(Objected to as incompetent.)

Answer. That would be impossible to tell exactly.

Question. The conditions being the same at that time on the 1st of July, 1899, when the American Imprinting Company was organized, the conditions being the same at that time as they had been the year prior, would you have sent your work to the Milliken Imprinting Company; would you have continued to send your work to the Milliken Imprinting Company if it had not been for the formation of the American Imprinting Company?

(Objected to on the same ground and on the ground that it is an hypothesis.)

Question (continuing). The conditions being the same, you understand?

Answer. Well, we would have been likely to.

Question. What was the amount of work the American Imprinting Company did for you during the year July 1, 1899, to July 1, 1900?

(Objected to as immaterial.)

Answer. 2,721,859 stamps; that is, from July 1, 1899, to July 1, 1900.

31 Cross-examination by Mr. HAZELTON:

Question. How did you get these figures, Mr. Brown, that you have given us?

Answer. These come from our books—the records.

Question. Does that mean the number of stamps that were imprinted for your firm during that time by the American Imprinting Company?

Answer. Yes, sir.

Question. Not by the Milliken Imprinting Company?

Answer. No, sir; by the American Imprinting Company. That is taken from our books.

Question. How many stamps on each sheet?

Answer. There were sometimes six, sometimes five; seldom less than five; occasionally three; but most of them was five and six. I think the largest quantity would be six, and then it would be five, and three.

Question. Could you tell the proportion?

Answer. No; we could not tell.

Question. You could not tell that from your books?

Answer. No; we could not tell that from our books.

Question. Could you tell how much those stamps would have cost if imprinted by the Milliken Imprinting Company under the contract on which this present suit is brought, or have you read that contract?

Answer. We could not tell by that.

Question. You could not?

Answer. No; because the same price—we paid the American Imprinting Company the same regular price that we paid the Milliken Imprinting Company; and where the profit comes in, is what we got in returns as dividends from the American Imprinting Company, according to the stock which we held. The largest proportion of the stamps imprinted

were five and six to the sheet. Occasionally there would be a lot of three, but the proportion was very small.

Question. I suppose your firm derived some profit from this American Imprinting Company?

Answer. Yes, sir.

Question. And therefore it was to your interest to increase the business of the American Imprinting Company, was it not?

Answer. Yes, sir.

Question. For whom did you do business—the firm, I mean; where would you get your customers from?

Answer. From banks all over the country.

Question. Their depositors would want blank checks; is that the idea?

Answer. Yes, sir; that is it.

Question. And the more you increased the business of this American Imprinting Company the more money you would make; is that the idea?

Answer. Yes, sir.

Question. Now, under your arrangement with the Milliken Imprinting Company during the year previous—that is, 1898 to 1899—did you get any profit from them for customers whom you sent to them?

Answer. No.

Question. And did any of the other firms, as far as you know?

Answer. As far as I know, they did not.

32 By Mr. MILLIKEN:

Question. You have no interest in this suit, have you?

Answer. No, sir.

By Mr. HAZELTON:

Question. Did you ever object to any of the work that was done for you by the Milliken Imprinting Company?

Answer. We may have had some kicks, but no substantial objection. Of course, it is impossible to do that amount of business without some kicking, but most of the kicking was because we did not get the work quickly enough.

Question. But the character of the work they did was satisfactory?

Answer. Yes, sir.

Question. That is, during the year previous?

Answer. Yes, sir.

By Mr. MILLIKEN:

Question. Do you know of anything further, or have you any information about the matter in controversy, that is material to the issues herein in favor of or against either of the parties?

Answer. No, sir.

It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Milliken Imprinting Company," or "the claimant," or similar expressions, should read "David Milliken, jr., & Co."

HERSEY BROWN.

Deposition of William E. Badeau, for claimant, taken at the city of New York, on the 16th day of February, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, John H. Hazelton.

WILLIAM E. BADEAU, being first duly sworn by the notary as a witness on behalf of the claimant, testifies as follows:

Direct examination by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.

Answer. My name is William E. Badeau; age 50 years; reside at Summit, N. J., and I am manager for J. H. Warner, stationer, of this city.

Question. What is the business of J. H. Warner?

Answer. Manufacturing stationer; bank stationer.

Question. And as such you manufacture checks for different banks, do you?

Answer. Yes, sir.

Question. Did your business require you, under the war-revenue act passed during the Spanish-American war, to have revenue stamps printed on bank checks?

Answer. It did.

Question. You did have to have that, I understand?

Anwer. Yes, sir.

Question. Who did that work for you prior to July 1, 1899?

Answer. The Milliken Imprinting Company.

33 Question. And was that business done by them for you in every way satisfactory?

(Objected to as immaterial.)

Answer. It was.

Question. How long prior to July 1, 1899, did they do this work for you?

Answer. I could not state that exactly.

Question. The greater part of the year, the prior year?

Answer. Yes, sir; prior to the time that the American Imprinting Company secured their contract.

Question. Do you recollect when it was they secured their contract?

Answer. No.

Question. Did you at the time of the organization of the American Imprinting Company transfer your business to that company from the Milliken Imprinting Company?

Answer. We did; yes, sir.

Question. Were you one of the stockholders of the American Imprinting Company?

Answer. I was.

Question. What business was that company engaged in?

Answer. In imprinting revenue stamps.

Question. On bank checks?

Answer. Yes, sir.

Question. Any other business?

Answer. No, sir. Bank checks and drafts.

Question. That is, printing the stamps?

Answer. Yes, sir; printing the stamps.

Question. Did not do anything else but that?

Answer. That is all.

Question. Now, if it had not been for this contract which was awarded to the American Imprinting Company—you know, do you not, about the contract that was awarded to the American Imprinting Company?

(Question objected to by Mr. Hazelton as leading, and also as incompetent.)

Mr. MILLIKEN. I only wanted to shorten the examination. I will withdraw the question.

Question. Do you know that a contract was made to the American Imprinting Company by the United States Government?

Answer. I do.

Question for the imprinting of revenue stamps on bank checks?

Answer. I do; yes, sir.

Question. You were a stockholder in that company, were you not?

Answer. Yes, sir.

Question. If it had not been for the contract awarded to the American Imprinting Company, which you have referred to, would you have continued to send you business of printing revenue stamps to the Milliken Imprinting Company?

(Question objected to as incompetent.)

Answer. We would, if the work had continued to be satisfactory.

Question. Then your sole reason for taking your business from the Milliken Imprinting Company was to give it to the American Imprinting Company, of which you became a director?

Mr. HAZELTON. Same objection.

34 Answer. Yes, sir.

Question. What is the total number of stamps the American Imprinting Company printed for your firm from July 1, 1899, to July 1, 1900?

(Question objected to as immaterial and incompetent.)

Answer. 3,663,093 stamps.

Question. Where did you get those figures from?

Answer. From my books.

Question. Kept in the regular course of your business?

Answer. Yes, sir.

Question. (By Mr. Hazelton.) You mean in the regular course of business of your firm?

Answer. Yes, sir; the books of J. H. Warner, you may say.

Question. Have you any interest directly or indirectly in this claim of the Milliken Imprinting Company?

Answer. None whatever.

Cross-examination by Mr. HAZELTON:

Question. Referring to these figures that you have given—do you know how many of those stamps were on the various pages—that is, on the different sheets?

Answer. They were on sheets.

Question. As I understand it, some of these sheets contained more or less stamps; is that right?

Answer. Yes, sir.

Question. Now of those stamps which you had printed, can you tell how many were on each sheet, or the average, in any way?

Answer. Well, the average would be, I should say—they printed five and ten and twelve to a sheet, my recollection is, five, ten, and twelve—I do not know as I can give a fair average.

Question. Well, could you in a general way?

Answer. I would, in a general way, say ten.

Question. Just what do you mean by that?

Answer. Well, ten checks on a sheet, making one impression.

Question. On the average?

Answer. Yes, sir; on the average.

Question. That is, some less than ten, and some more, but the average would be ten checks to a sheet; is that what you mean?

Answer. Yes, sir; very few had less than ten, unless it was a small job running five at a time.

Question. Were you a very extensive stockholder in that American Imprinting Company—I understand that you yourself, individually, were a stockholder?

Answer. Yes, sir.

Question. And your firm?

Answer. No, sir; I was one of the stockholders. I represented the firm. It was for the purpose of securing the benefits from it, you know, that I went in.

Question. Were you an officer of the company other than a director?

Answer. No, sir.

Question. As I understand it, the stockholders realized considerable out of this company, is that so—as such—as stockholders?

(Objected to as immaterial.)

Answer. I do not remember that particularly.

35 Question. Well, there was some profit in it?

Answer. Yes, sir; there was profit in the business. There was a dividend on the stock, you know; but what those dividends were I do not remember.

Question. I did not ask you that. So it was to your advantage, and to the firm's advantage, to increase the business of the American Imprinting Company, was it?

Answer. Yes, sir.

Question. During the year previous to the formation of the American Imprinting Company—that is, during the time when the Milliken Imprinting Company did the work for your firm—did you receive anything from the Milliken Imprinting Company for sending your business to them?

Answer. Compensation?

Question. Yes.

Answer. No.

Question. You paid them the regular rate provided for in the contract?

Answer. Yes, sir; paid them the regular rate.

Question. And after the formation of the American Imprinting Company, while the American Imprinting Company on its face received just the same rates for the printing, the stockholders, by dividends, received some of that back; is that the idea?

Answer. That is the idea; yes, sir.

Question. I suppose the books of your company would justify these figures?

Answer. Yes, sir.

Question. You took them off the books, did you?

Answer. Yes, sir.

Question. You took them off yourself, personally?

Answer. Yes, sir.

Question. And you know they are correct?

Answer. Yes, sir.

Question. Is there any class of business covered by those figures that would not have gone to the Milliken Imprinting Company during that period had the Milliken Imprinting Company been the only company having such contract from the Government?

Answer. I do not quite understand the first part of that question.

(Question repeated.)

Answer. No; the printing was all the same with all the corporations.

Question. The American Imprinting Company, then, was formed in order that your firm, and the other persons or firms composing it, might realize a profit out of the imprinting of these stamps?

Answer. Yes, sir.

By Mr. MILLIKEN:

Question. Do you know of anything that has not been brought out by the testimony in the questions submitted to you that is material to the issue and that would tend to the benefit or advantage of the plaintiff or defendant?

Answer. No; I think it is entirely covered.

36 By Mr. HAZELTON:

Question. You have no interest in the Milliken Imprinting Company?

Answer. No, sir.

Question. Or never had?

Answer. No, sir; never had. We were giving it to the party who would do it the cheapest and best.

Question. From July, 1898, to July, 1899—that is, during the period when the Milliken Imprinting Company did the business for your firm—was any of it unsatisfactory to you—any of the work done?

Answer. I would not want to say it was unsatisfactory. We had kicks, you know, such as you would get in all manufacturing business.

Question. What were they about?

Answer. Oh, immaterial things.

Question. You do not usually kick about immaterial things, do you?

Answer. Little things.

Question. What were the kicks about?

Answer. About the sheets being greased, and being creased, and things of that kind; but that was all. There was nothing much.

Question. What was the extent of those kicks?

Answer. Very slight. We are particular people, and I suppose we kicked on general principles; and we like to get our work promptly and well done.

Question. Well, did they do it well and promptly?

Answer. Yes, sir; they did it very satisfactorily.

Question. You would not have left them on that account?

Answer. No; because we continued to give them business after these kicks occurred.

Question. You continued to give them work because they were the only firm that had the contract and you had to give it to them?

Answer. No; there was another concern.

Question. What was that concern?

Answer. The Franklin Lee Bank Note Company.

Question. Did they do as good work as the Milliken Imprinting Company?

Answer. They did just as good work, but they did direct work.

Question. What do you mean by that?

Answer. They did direct work for the banks, which was antagonistic to us. They sold to the banks direct.

Question (by Mr. Milliken). You mean sold the checks?

Answer. Yes, sir; sold the checks to them. So that when they imprinted stamps for us they knew our business—they knew just how many checks were selling.

Question. I wish you would explain that a little more fully.

Answer. The Franklin Lee Bank Note Company did a direct business; that is, they sold checks and drafts to banks and made a profit on them. They had this contract also for printing revenue stamps, so it was to our business interests to give it to that concern which had no such affiliations.

Question. So that you could sell the checks and drafts to the banks?

Answer. We did not care to have the Franklin Lee Company know our business.

Question. That is, to know the form of the checks?

37 Answer. We did not care to have them know the form of checks, and how many checks we were selling; and for that reason we would prefer to give the business to the Milliken Imprinting Company, because they did no such direct work; they simply imprinted the stamps.

Question. On the checks and drafts furnished by you?

Answer. Yes, sir; and by other bank manufacturing stationers.

Question. That is, the Franklin Lee Bank Note Company not only charged you the same rate for imprinting stamps, but by selling direct to the banks they deprived you of your profit as stationers on bank drafts and checks; is that right?

Answer. You say, deprived us of it. They might deprive us of it; there was a possibility of it.

Question. That is, whatever they did, they deprived you of the profit on it—is that it?

Answer. No; I would not like to say that. I would not want to say that. The mere fact of their doing direct business was a menace to the stationers.

Question. That is, they did actually sell, did they not, to some extent?

Answer. Yes, sir.

Question. And whatever they did sell they deprived you of the profit on?

Answer. I would not want to say that.

Question. I mean by you, your firm, and other firms?

Answer. Yes, sir; you might state that.

It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Milliken Imprinting Company" or "the claimant" or other similar expressions should read "David Milliken, jr., & Co."

WILLIAM E. BADEAU.

Deposition of Ralph Balmer, for claimant, taken at the city of New York, on the 16th day of February, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, John H. Hazelton.

Direct examination by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.

Answer. Ralph Balmer; age, forty-three; residence, Jersey City, N. J.; occupation, manager of Styles & Cash, corporation.

Question. What is the business of the corporation Styles & Cash?

Answer. Manufacturing stationers and printers.

Question. Does it involve the manufacture and printing of bank checks?

Answer. Yes, sir.

Question. Did your business require the imprinting of revenue stamps on bank checks under the war-revenue bill during the Spanish-American war?

Answer. It did.

Question. Who did that business for you?

38 Answer. The Franklin Lee Bank Note Company.

Question. When?

Answer. That was in 1898.

Question. How long did it do business for you?

Answer. About four months.

Question. Then, after that, who did the business for you?

Answer. The Milliken Imprinting Company.

Question. Were you satisfied in every way with the character of the work done for you by the Milliken Imprinting Company?

Answer. Yes, sir.

Question. Do you know the American Imprinting Company?

Answer. I do not know them; I know of them.

Question. You know there was such a company?

Answer. Yes, sir.

Question. Did they do business for you of imprinting stamps on checks?

Answer. Yes, sir.

Question. On about what date?

Answer. July, 1899.

Question. July 1, 1899?

Answer. Yes, sir.

Question. And how long did they continue to do the business for you?
Answer. Until March 28, 1901.
Question. Why did you transfer your business from the Milliken Imprinting Company to the American Imprinting Company?
(Objected to as immaterial and incompetent.)
Answer. I could not say why it was done.
Question. Can you state whether or not, if it had not been for the contract of the American Imprinting Company, you would have continued to send your business to the Milliken Imprinting Company?
(Same objection.)
Answer. Yes, sir.
Question. You would have sent it to the Milliken Company?
Answer. Yes, sir.
Question. What is the total number of stamps the American Imprinting Company printed for you from July 1, 1899, to July 1, 1900?
(Objected to as incompetent and immaterial.)
Answer. 2,219,350 stamps.
Question. Where do you get those figures from?
Answer. From our books.
Question. Did you take them off yourself?
Answer. No.
Question. But you know they were taken from the books used in the regular course of business—of your business?
Answer. Yes, sir.
Question. Have you any interest, directly or indirectly, in the claim of the Milliken Imprinting Company in this matter?
Answer. No, sir.
Mr. HAZELTON. I ask to have these figures given by the witness stricken out, unless they conform to the figures on file with the Government in Washington.
Mr. MILLIKEN. The attorney for the claimant stipulates that unless they do that, they shall be made to conform with the records in Washington.
39 The WITNESS. That date given above there as July 1, 1899, should be July 11, 1899. I wish you would correct that.

Cross-examination by Mr. HAZELTON:

Question. In fact, you know these figures are correct?
Answer. Yes, sir.
Question. Did you have any connection with the American Imprinting Company?
Answer. No, sir.
Question. Was any member of your firm connected with the American Imprinting Company?
Answer. Yes, sir.
Question. Some one of the members?
Answer. Yes, sir.
Question. Who was it?
Answer. Both Styles and Cash.
Question. Both of them?
Answer. Yes, sir.
Question. And they owned stock?

Answer. Yes, sir; they owned stock.

Question. And was either of them an officer or director in the company?

Answer. No, sir.

Question. Do you know whether they were extensive stockholders?

Answer. That I could not say?

Question. You do know, I suppose, from hearing them say so, that they drew dividends from the company?

Answer. Yes, sir.

Question. Just the same as all the other stockholders?

Answer. Yes, sir.

Question. And therefore it was to their advantage to increase the business of the American Imprinting Company?

Answer. Yes, sir.

Question. During the year previous to the formation of the American Imprinting Company, when the Franklin Lee Bank Note Company and the Milliken Imprinting Company did the business for your firm, did the firm realize anything out of such imprinting, or did they simply pay to those companies, respectively, the prices charged in the contracts with the Government?

Answer. No; simply paid those prices.

Question. So that after the formation of the American Imprinting Company the firm realized from the imprinting a profit which they had not previously realized?

Answer. Yes, sir.

Question. You say you did business with the Franklin Lee Bank Note Company for about four months, and for the balance of the year previous to the formation of the American Imprinting Company with the Milliken Imprinting Company?

Answer. Yes, sir.

Question. Why did you leave the Franklin Lee Bank Note Company?

Answer. That I could not say.

Question. You do not know?

Answer. No.

Question. Was the work of the Milliken Imprinting Company during that period always satisfactory to the firm, or don't you know?

Answer. Yes, sir; it was.

Question. You know that of your own knowledge, do you?

Answer. Yes, sir.

Question. You never had any trouble with it at all?

Answer. No, sir.

Question. Not even the kicks that have been referred to by the previous witness in your presence?

Answer. No, sir.

Question. There was never any question about the character of the work?

Answer. No question about it.

Question. Was there any question of the character of the work of the Franklin Lee Bank Note Company?

Answer. No, sir.

Question. That was satisfactory also?
Answer. Yes, sir.
Question. Are you connected in any way with the Milliken Imprinting Company?
Answer. No, sir.
Question. Never have been?
Answer. No, sir.
Question. Didn't your firm have any connection with the Milliken Imprinting Company?
Answer. No, sir.
Question. So that you have no interest in this suit in any way?
Answer. No, sir.

By Mr. MILLIKEN:

Question. Was the work done for you by the Franklin Lee Bank Note Company promptly returned to you in every instance?
Answer. No; that was one reason why we removed the business from them to the Milliken Imprinting Company. The work was well done, but it was very slow.
Question. And therefore unsatisfactory to you?
Answer. Yes, sir.
Question. And that was one of the reasons you transferred your work to the Milliken Company?
Answer. Yes, sir.

By Mr. HAZELTON:

Question. I thought you said you didn't know why the work was removed from the Franklin Lee Bank Note Company to the Milliken Imprinting Company?
Answer. Well, that was one of the reasons that I gave to the firm for changing, but ultimately why it was changed I could not say, because I did not change it myself.

By Mr. MILLIKEN:

Question. Do you know anything further, Mr. Balmer, relating to this matter for or against the claimant or defendant, that you have not stated?
Answer. No, sir.

41 It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Milliken Imprinting Company" or "the claimant" or similar expressions, should read, "David Milliken, jr., & Co."

RALPH BALMER.

Deposition of Charles H. Mann, for claimant, taken at the city of New York, on the 16th day of February, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, John H. Hazelton.

Direct examination by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.

Answer. Charles H. Mann; age, 54 years; residence, Haddonfield, N. J., and president of the William Mann Company.

Question. What is the business of the William Mann Company?

Answer. Lithographers, printers, stationers, and bank outfitters.

Question. And does that business include the printing and making of checks for banks?

Answer. It does—checks, drafts, etc. It does now and it also did.

Question. Did your business require the imprinting of revenue stamps on bank checks made necessary by the act of Congress during the Spanish-American war?

Answer. It did.

Question. And you had them printed in large quantities, did you?

Answer. Yes, sir.

Question. Who did that business for you prior to July 1, 1899?

Answer. That is, prior to the contract of the American Imprinting Company?

Question. Yes.

Answer. The Franklin Lee Bank Note Company.

Question. And did anyone else?

Answer. I do not know if during any of that time we had work done by the Milliken Imprinting Company or not. I can not say.

Question. Your part of the business is mainly—that is, the direct part of it—is mainly in Philadelphia, is it not?

Answer. Mainly in Philadelphia; yes.

Question. When was the American Imprinting Company organized, if you know?

Answer. I think the American Imprinting Company got the contract with the Government dating from July 1, 1899.

Question. Did you become a member of that company?

Answer. I became amember—a stockholder—and subsequently became president of the company.

Question. What was the business of the American Imprinting Company?

Answer. Simply the imprinting of revenue stamps on checks, drafts, etc., under contract with the Government.

Question. And they did nothing else?

Answer. Nothing else.

Question. Who composed the members of the American Imprinting Company, largely, if you can state?

42 Answer. It is impossible for me to state the names at this time, but principally of New York, Philadelphia, and Baltimore stationers and printers, I think.

Question. And did you from the time of the organization of the American Imprinting Company have your work, or most of it, done by that company?

Answer. As soon as the American Imprinting Company were prepared to do the work we gave them almost all our work.

Question. Do you know about what time that was?

Answer. I can not say; but it was very soon after they got the contract. There was no delay in getting the plant together and commencing operations. I do not know the exact number of days.

Question. You mean delay after the 1st of July?

Answer. After the 1st of July; yes, sir; after the contract was given.

Question. If it had not been for the contract granted to the American Imprinting Company, where would you have had your stamps on bank checks printed?

(Objected to as immaterial and incompetent.)

Answer. May I answer that in my own way?

Question. Of course.

Answer. I was very much dissatisfied with the New York contractor——

Question. Who was that?

Answer. The Franklin Lee Bank Note Company, on account of their being competitors in our line of business, and therefore in a position to get information as to whom we did work for; and also on account of the various prices they had for imprinting stamps; and for that reason I, with other stationers, succeeded in getting this contract for the American Imprinting company, which I think was obtained—I think the American Imprinting Company had been organized before that; it was an old charter they had, and I believe the American Imprinting Company had a contract with the Government before that; but that they did not fulfill some requirements and did not take it out, or something of that kind.

Question. They never performed any work under that contract with the Government?

Answer. No work whatever, until after the contract referred to of July 1, 1899; and in answer to your question I will say that under those circumstances we certainly would not have continued our work with the Franklin Lee Bank Note Company.

Question. And if it had not been for the contract granted to the American Imprinting Company, of which you became a member, where would you have had that work done?

(Same objection.)

Answer. We would have sent all our work—with the exception of a very little of it we did in Philadelphia—to the Milliken Imprinting Company.

Question. Can you state the amount of business done by your company, through the American Imprinting Company, from the 1st of July, 1899, to July 1, 1900?

(Objected to as immaterial and incompetent.)

Answer. I can state about the amount of stamps imprinted during that period by our Philadelphia office. The amount of work done
43 by the Philadelphia office by the American Imprinting Company was in the neighborhood of 5,700,000 stamps during that period.

Question. Can you procure the figures, the amount of work done by your New York house through that company, during that period?

Answer. I think I can—yes, sir.

Question. Will you do so?

Answer. Yes, sir. The number of stamps imprinted for our New York office by the American Imprinting Company was 12,000 to 13,000.

Question. You have not got the exact figures, the amount of work done by or in the Philadelphia house?

Answer. It would be almost impossible to obtain it at this time.

Question. But would you say it was more or less than 5,700,000 stamps?

Answer. No; I can not tell at this time. I think those figures I have stated are fairly accurate.

Question. Those figures you have given here of 5,700,000 were taken from the books used in your business?

Answer. You mean from the books of the William Mann Company—yes, sir; by my directions.

Question. You know those figures to be approximately correct?

Answer. I do not know of my own knowledge, but they were taken from the books, by my instructions, by the treasurer of the company and the chief bookkeeper of the company, and given by them to me.

Question. You have no interest, have you Mr. Mann, in this claim of the Milliken Imprinting Company?

Answer. None whatever.

Question. Directly or indirectly?

Answer. None whatever.

Mr. HAZELTON. I ask that the above figures be stricken out if they do not conform with the figures on file with the Government in Washington.

Mr. MILLIKEN. The attorney for the claimant renews his stipulation to have them conform with the records in Washington, should there be any variance.

Cross-examination by Mr. HAZELTON:

Question. The figures which you have just given are the number of stamps approximately printed for the William Mann Company by the American Imprinting Company, not the number of stamps printed by the Milliken Imprinting Company?

Answer. The number of stamps I have given approximately are the stamps printed for the William Mann Company by the American Imprinting Company.

Question. Do you know what they would average on a sheet—how many on a sheet?

Answer. I should judge only in this way; I should judge, according to the two prices the Government fixed to be charged, which was 80 cents per thousand for five on a page and over $1 per thousand for less than five, that the average would be about 95 cents per thousand.

Question. But you can not tell that accurately; that is just your impression?

Answer. Yes, sir; that is my general impression.

Question. You were the president of the American Imprinting Company soon after its formation?

Answer. From its organization until it was dissolved.

44 Question. And of course a stockholder as well?

Answer. Yes, sir.

Question. To a considerable extent?

Answer. Not to such a great extent.

Question. Was there any other member of your company a stockholder than yourself?

Answer. I do not remember; I think not.

Question. Is the William Mann Company a corporation or a firm?

Answer. A corporation, under the laws of Pennsylvania.

Question. And as a stockholder of the American Imprinting Company you drew dividends?

Answer. As a stockholder of the American Imprinting Company I drew dividends; yes.

Question. And a salary also as an officer?

Answer. Yes, sir.

Question. So, of course, it was to your advantage and to the advantage of the William Mann Company to do as much business as possible with the American Imprinting Company?

Answer. The William Mann Company derived no benefits whatever from the dividends of the American Imprinting Company.

Question. But you did yourself?

Answer. Individually, I did.

Question. And therefore it was to your advantage to do that, but not to the advantage of the company?

Answer. Not to the advantage of the company.

Question. And the more the business of the American Imprinting Company increased the more profit you drew from it as a stockholder?

Answer. As a stockholder I drew more profit.

Question. You never did any business with the Milliken Imprinting Company at all, as I understand it?

Answer. I do not remember on that point.

Question. But you do not think you did?

Answer. I do not think we did at that time, although after the contract was awarded to the American Imprinting Company our New York branch had work done by the Milliken Imprinting Company.

Question. Your New York branch of what?

Answer. Of the William Mann Company.

Question. Was that under the contract upon which this suit is brought, do you know—that is, the contract beginning July 1, 1899, of the Milliken Company?

Answer. It was under that contract, I think.

Question. How did you happen to put into the hands of the Milliken Imprinting Company, following July, 1899, any business at all—that is, after the formation of the American Imprinting Company?

Answer. By instructions from our customers.

Question. Where they requested it, was it?

Answer. Yes, sir.

Question. Otherwise, of course, it would have gone into the American Imprinting Company?

Answer. Yes, sir.

Question. In which you were interested?

Answer. Yes, sir; it would have gone into the American Imprinting Company.

45 Question. I suppose the William Mann Company has a great many people on its books—customers—and, except where specially directed otherwise, you placed this class of business in the American Imprinting Company?

Answer. After the contract of the Government of July, 1899.

Question. And all orders for stamps were placed with the American Imprinting Company?

Answer. Yes, sir; unless we had instructions to the contrary; unless requested by customers to place orders elsewhere, and with the exception of the stamps imprinted by the Penn Publishing Company in Philadelphia—we gave them some work.

Question. How did you come to give the Penn Publishing Company some work?

Answer. To keep them in good humor.

Question. Did the Penn Publishing Company have a contract with the Government for the printing of stamps in Philadelphia?

Answer. Evidently they had.

Question. You spoke of the Franklin Lee Bank Note Company and of being dissatisfied with them. Will you explain a little more fully why you were not satisfied with them and why, therefore, as you state, you would not have continued to place your business with them but would have placed it with the Milliken Imprinting Company had the American Imprinting Company not been formed?

Answer. I looked on them as competitors in our lithographing and printing business, and I also ascertained that they had various prices for imprinting revenue stamps, and I did not think at times we were getting as low prices for imprinting stamps as other concerns in the same line of business. I do not know as I can add anything to that.

Question. Didn't you pay the Franklin Lee Bank Note Company the prices stated in the contract with the Government, or did you have a rebate of some sort?

Answer. Prior to July 1, 1899, the contracts of the Government simply stipulated the maximum price to be charged, and, as I understand it, the contractors were at liberty to charge any price they chose not exceeding the price named by the Government.

Question. You are talking now of work done previous to the contracts beginning July 1, 1899, are you?

Answer. Yes, sir.

Question. If I understand you correctly, though, there was no profit to the William Mann Company or to yourself on business placed in the hands of the Franklin Lee Bank Note Company; you simply paid them whatever price they charged you. I mean there was no rebate coming back to you—they did not charge you one price and pay you some money back on it?

Answer. No rebate. The William Mann Company made a profit on the price the Franklin Lee Bank Note Company charged.

Question. I do not think I make myself plain. After the American Imprinting Company was formed, the American Imprinting Company charged a certain price for imprinting stamps——

Answer. A set price.

Question. But out of that price there came to you individually as a stockholder a certain percentage of it as profit, as dividends——

Answer. As dividends on the amount of stock I held; yes.

46 Question. Now, previous to the formation of the American Imprinting Company you had no such profit as that? Whatever profit came to you or to the William Mann Company, it came simply as

something which you charged in excess of what it cost you to have the stamps imprinted; is that it?

Answer. That is correct.

Question. Have you ever had any interest in the Milliken Imprinting Company, or in any business with Mr. Milliken?

Answer. None whatever.

Question. And have no interest in this suit, I suppose?

Answer. None at all.

Question. Is this contract with the American Imprinting Company still in force, or is it still a company doing business?

Answer. The company has been dissolved, and the contract, if I remember correctly, was given up by the American Imprinting Company before the expiration of the time set for the repeal of the tax on checks.

Question. When you referred to the Franklin Lee Bank Note Company and your dissatisfaction with them, you were referring especially then to the fact that they not only imprinted checks and drafts, but that they printed checks and drafts, so that they interfered with the operation of your business; is that it? That is, they sold checks and drafts themselves, and also imprinted stamps on them?

Answer. That is correct; and the first portion of that was an interference with the business of the William Mann Company—not an interference exactly, but——

Question. Well, but what then?

Answer. But as competitors they obtained information which might be valuable to them.

Question. And also they took some of your profits away?

Answer. And possibly took advantage of the information thus obtained.

Question. Didn't they, in fact, sell checks and drafts?

Answer. They sold direct to the banks.

Question. And where they did sell they took from your company or some other company that profit; isn't that the idea?

Answer. Yes, sir.

By Mr. MILLIKEN:

Question. Was, to your knowledge, the imprinting of revenue stamps on bank checks greater during the second year of the existence of the law requiring it than the first year?

(Objected to as immaterial and incompetent, unless the witness knows this of his own knowledge.)

Question. You know the state of your business. Was your business larger the second year of the existence of this law than it was the first?

Answer. My recollection at this time is that our business during the second year of the imprinting of stamps on checks was much larger than the first year.

47 Question. (By Mr. HAZELTON.) That is, the business of the William Mann Company?

Answer. Yes, sir.

Question. Do you know any reason for that increase in business?

Answer. I am under the impression that the public thought that the stamps on checks would only be for a very short time, and were there-

fore reluctant to order large quantities of checks, drafts, etc., imprinted with stamps, for fear that they would have them left on their hands.

Mr. HAZELTON. I ask to have this answer stricken out as an impression.

Question. Did the contract to the American Imprinting Company continue in force until the 1st of July, 1900?

Answer. It continued up to that date and after that date.

By Mr. HAZELTON:

Question. Are the figures which you have given confined to the year ending July 1, 1899, or do they go up to the end of business done by the American Imprinting Company?

Answer. They embrace the twelve months from July 1, 1899, until July 1, 1900.

Question. And nothing else?

Answer. And nothing else.

By Mr. MILLIKEN:

Question. Do you know anything, Mr. Mann, which you have not stated here that refers to the subject-matter in dispute, to the benefit of the claimant or defendant?

Answer. I do not.

CHAS. H. MANN.

Subscribed and sworn to before me this 26th day of February, 1904.

E. W. STARR,
Notary Public, Kings County.

Upon reflection I am able to state that the amount of work sent by William Mann Company from Philadelphia to the American Imprinting Company was 5,705,000 stamps.

CHAS. H. MANN.

Subscribed and sworn to before me this 26th day of February, 1904.

E. W. STARR,
Notary Public, Kings County.

It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Millikin Imprinting Company" or "the claimant" or similar expressions should read "David Milliken, jr., & Co."

48 *Deposition of Samuel Williams, for claimant, taken at the city of New York on the 18th day of February, A. D. 1904.*

Claimant's counsel, David Milliken; defendant's counsel John H. Hazelton.

SAMUEL WILLIAMS, being first duly sworn by the notary, testifies on behalf of the claimant, as follows:

Direct examanition by Mr. MILLIKEN:

Question. State your name, age, residence, and occupation.

Answer. Samuel Williams; age, 42 years; residence, 147 West One

hundred and fifth street, Manhattan, city of New York; occupation, president of the Milton C. Johnson Company, manufacturing stationers.

Question. And as such stationers do you print a large number of checks for banks?

Answer. Yes, sir.

Question. Did you, during the Spanish-American war, under the war-revenue act passed at that time, requiring the imprinting of revenue stamps, have such stamps imprinted on checks?

Answer. Yes, sir—that is, the Government required it.

Question. But under that act you had them stamped?

Answer. Yes, sir.

Question. Prior to July 1, 1899, who did that work for you here in the city of New York?

Answer. The Milliken Imprinting Company did the most of it prior to that, but up to a certain time you did not do any.

Question. Have you any idea what time that was—up to about what time?

Answer. July 28, 1898.

Question. And did you after that time continue to send all your work to the Milliken Imprinting Company?

Answer. Yes, sir.

Question. Up to the time of the organization of the American Imprinting Company?

Answer. Yes, sir.

Question. Were you satisfied in every way with the work performed by the Milliken Imprinting Company for you?

(Objected to as immaterial.)

Answer. Yes, sir; except when there were occasional delays in deliveries.

Question. But those were not serious delays, were they; simply such delays as would arise in any business?

Answer. Yes, sir; that was all.

Question. You were a stockholder in the American Imprinting Company, were you not?

Answer. Yes, sir.

Question. And when that company was organized you transferred your business of imprinting stamps to that company, did you?

Answer. Yes, sir; naturally.

Question. And, of course, you derived a profit from the American Imprinting Company from the stock you held as a stockholder?

Answer. Yes, sir; that was a personal matter.

49 Question. If it had not been for the organization of the American Imprinting Company, would you have continued to send your work of imprinting stamps to the Milliken Company?

(Objected to as immaterial and incompetent.)

Answer. I presume so.

Question. What was the amount of business done by the American Imprinting Company for you from July 1, 1899, to July 1, 1900?

(Objected to as immaterial and incompetent.)

Answer. It would be about 5,000,000 stamps.

Question. Would you say it would be more than or less than that?

Answer. It would be between 5,000,000 and 6,000,000, so I put it at 5,000,000 to be sure.

Question. But you are sure it would be at least 5,000,000 of stamps?

Answer. Yes, sir.

Question. There was only one other contractor in the city of New York besides the Milliken Impriting Company and the American Imprinting Company, was there not?

Answer. I do not know.

Cross-examination by Mr. HAZELTON:

Question. Were you an officer in the American Imprinting Company?

Answer. Not an officer; no.

Question. A director?

Answer. I was a director.

Question. And a stockholder?

Answer. Yes, sir; and on the auditing committee; I do not know as that would come in as an officer of the company.

Question. Of course it was to your advantage to increase the business of the American Imprinting Company, was it not?

Answer. Oh, yes; naturally.

Question. During the period when you sent the work of your company to the Milliken Imprinting Company, was there any profit to you or to your company for so sending the checks to the Milliken company for imprinting?

Answer. Do you mean from them or from our customers?

Question. I do not mean from your customers; I mean from them.

Answer. Oh, no.

Question. That is, you paid the regular price?

Answer. The regular established rate, as I understand it.

Question. But after the American Imprinting Company was formed you yourself drew a profit from the imprinting of the stamps as a stockholder, aside from the fact that your company drew a profit from the sale of the checks, drafts, etc.?

Answer. The American Imprinting Company drew no profit except what the stockholders drew.

Question. Where did you get these figures—the 5,000,000 stamps?

Answer. From our books.

Question. And you know those are correct, of your own knowledge?

Answer. To that extent—about 5,000,000. I could tell in half an hour exactly. My bookeeper is just figuring it up now.

Question. Can you tell how many stamps, on an average, were printed on a page?

Answer. No; that would be impossible.

Question. You could not tell in any way?

50 Answer. No, sir.

Question. Even your books would not show that?

Answer. No; the books do not give it. We paid so much a thousand stamps without regard to how many we printed on a page, whether one or twelve.

Question. You were in no way connected with the Milliken Imprinting Company, or with Mr. Milliken?

Answer. No; except in these business transactions.

Question. You have no interest in this claim of the Milliken Imprinting Company in any way?

Answer. None whatever.

Question. What were the objections that were made to the work of the Milliken Imprinting Company about which you have spoken during the time they did your company's work?

Answer. Sometimes there was a little more delay than we liked, so much work, I suppose, was being piled in on them that they could not do it as quickly as our customers wanted it. Our customers were pounding us for stamped checks, and we could not give them.

Question. Was the character of the work always right?

Answer. Yes.

Question. Always so?

Answer. Practically so. Of course it has gone from my mind, any little question of checks being printed crooked or not; but practically the work was perfectly satisfactory.

Question. I suppose the directors of the American Imprinting Company took all business means that they knew of to increase the business of the American Imprinting Company?

Answer. I would not undertake to say they took all the means they knew of; but I know the matter was discussed several times—our going out and trying to influence other stationers to send their work to us—but it was never done. We felt that we wanted more business, but we found that stationers were a little averse to sending us their work—some who were trying—because they said, "You will know who our customers are, and that would be an objection to our doing so;" so we did not go into that to the fullest extent.

Question. But you did go into it to some extent?

Answer. Yes, sir.

By Mr. MILLIKEN:

Question. Your sole object in going to the American Imprinting Company, was it not, was to make the profit on the work that you sent to it, that came to you in the way of dividends on stock?

Answer. Yes, sir; and for the further reason that we would have more direct control over it; turn it out more quickly.

Question. Was the work performed for you by the Franklin Lee Bank Note Company in every way satisfactory?

(Objected to.)

Answer. Yes, except under the same conditions that it was not always turned out promptly.

Question. But the Franklin Lee Bank Note Company was in the same line of business, to the same extent as you were, in the manufacture of checks, etc.?

Answer. I suppose so. I do not know it to my own knowledge.

51 By Mr. HAZELTON:

Question. This American Imprinting Company was formed not only for the purpose of assisting your business and that of the other parties that you mention, but to get a personal profit of course to the individual stockholders?

Answer. Yes, sir; they did not do anything else; they were restricted to exactly that kind of work.

By Mr. MILLIKEN:

Question. Do you know anything that you have not stated that relates to the claim of the Milliken Imprinting Company that would be of benefit to the claimant or defendant?

Answer. Nothing that occurs to me.

Mr. HAZELTON. I move to strike out the figures above mentioned, provided they do not conform to the figures on file in the Treasury Department.

Mr. MILLIKEN. Attorney for the claimant stipulates to the same effect, that they will be made to conform if they do not.

It is hereby stipulated and agreed by counsel that wherever a question or an answer in this deposition refers to the imprinting of stamps from July, 1898, to July, 1899, the expressions "Milliken Imprinting Company" or "the claimant" or similar expressions should read "David Milliken, jr., & Co.

SAMUEL WILLIAMS.

Deposition of David Milliken, for claimant, taken at the city of Washington, D. C., on the 23d day of January, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, Hon. Louis A. Pradt.

DAVID MILLIKEN, having appeared as a witness on behalf of the claimant, was by me sworn before any question was put to him to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon deposed and said that his name is David Milliken; that his occupation is attorney at law; that his age is 52 years, and that his place of residence is the city and State of New York; that he is president of the claimant corporation, and has interest in the claim which is the subject of inquiry in said cause.

And thereupon the said David Milliken testified as follows:

The claimant performed the work of printing revenue stamps upon bank checks for the defendants under a contract with them for a period of one year, expiring July 1, 1899. During the continuance of that contract there was considerable dissatisfaction on the part of the users of the stamps and the contractors growing out of a lack of uniformity of price to be charged by the contractors for the work done. Subsequently, and on or about the 25th day of April, 1899, claimant received from the Commissioner of Internal Revenue a communication dated April 25, 1899.

(Claimant offers in evidence the communication referred to, to be marked "Exhibit D. M., No. 1.")

Subsequently, and on or about the 25th day of May, 1899, claimant had an interview with the Commissioner of Internal Revenue in the city of Washington, at which interview he delivered the acceptance of
52 the contract in accordance with the terms, provisions, etc., set forth and stated in the communication dated April 25, 1899. A copy of said communication is found in the reply of the Treasury Department, dated January 18, 1904, to the call of the court upon motion of the claimant requesting a copy of said communication. At this interview the Commissioner asked if I was going to make an application for renewal of my contract. I answered, "Yes; but not until the time approached,

12 o'clock, the time for closing; that I didn't want to take the chance of any applications being put in by persons who didn't have a contract on the 25th day of April, 1899." The Commissioner assured me that no such application would be received.

Mr. PRADT. This last statement of what was said by the Commissioner is objected to as inadmissible and incompetent, on the ground that said Commissioner is now deceased.

The WITNESS (continuing). I was then informed by the Commissioner that my application was accepted and my contract would be renewed. I then called upon Mr. Johnson, chief of the stamp division of the Bureau of Internal Revenue, and informed him that my contract had been renewed. And I was informed by him that it had been decided that the application of any person who had a contract would be granted. He then delivered to me two copies in blank of the contract to be executed. Whereupon I said, "I presume the only changes from the other contract are those contained in the letter or communication dated April 25, 1899?". And he said, "That is all." Whereupon I took the contracts away to New York, and subsequently executed them without reading them, and returned them to the Commissioner of Internal Revenue. Very shortly after this—I can not say how long after, but it was prior to the 1st day of July, 1899—I was informed that a contract to do the same work had been granted to the American Imprinting Company. Knowing that the American Imprinting Company did not have a contract to print stamps on the 25th day of April, 1899, and also didn't make an application for a contract prior to 12 o'clock on the 25th day of May, 1899, I looked up my contract, and then for the first time discovered that it failed to state that no application would be received from any person who did not have a contract on the 25th day of May, 1899, and it further did not state that no application would be received after 12 o'clock on the 25th day of May, 1899. I at once went to Washington and had an interview with Mr. Gage, who at that time was Secretary of the Treasury. I mentioned to him that the contract to the American Imprinting Company was in violation of his agreement with me, and showed to him at that time the communication dated April 25, 1899. He then admitted that that was the agreement, and stated that the contract to the American Imprinting Company had been granted through inadvertence. Upon my request to him to revoke it, he evaded it for the reason that the Commissioner of Internal Revenue was absent from the city, but stated that should it be violated in any way he would revoke it at once.

Mr. PRADT. All the foregoing testimony relating to statements made by Secretary Gage is taken under and subject to the objection that the same is incompetent and inadmissible.

The WITNESS (continuing). Subsequently, upon his own investigation, the contract with the American Imprinting Company was revoked for violation, to take effect on the 30th day of November, 1899. I
53 think that was the date. Prior to the 30th day of November, 1899, the time within which the said contract was to be revoked, it was extended, as I was informed, to the 1st day of January. But before the expiration of the time the revocation was rescinded and they were permitted to continue with the work. But the American Imprinting Company became composed almost entirely of persons, firms, or cor-

porations who were having their stamps imprinted by the claimant, including, among others, Stewart, Warren & Co., Corlies, Macy & Co., Wilbur & Hastings, Brown, Lent & Pett, Milton C. Johnson & Co., Styles & Cash, all of New York City, and the William Maim Company, of New York City and Philadelphia. These several firms have at all times stated that they were perfectly satisfied with the character of the work done for them by the plaintiff and that they would have continued to have their work performed by the claimant had it not been for the contract awarded to them, the American Imprinting Company, to do the work for themselves.

Mr. PRADT. This testimony relating to statements made by others is objected to on the ground that it is inadmissible, being hearsay.

The WITNESS (continuing). Subsequently and frequently I had interviews with the Secretary of the Treasury, who at all times freely and frankly admitted that the contract with the American Imprinting Company was in violation of the contract made with the claimant.

Mr. PRADT. This last statement is objected to on the ground that it is incompetent and inadmissible.

The WITNESS (continuing). I have had several interviews with Mr. Johnson and was informed by him that he was familiar with the formulation of the terms and conditions contained in the letter of April 25, 1899; that it was the intention of the defendants to make the contracts in such a way that contractors could make a profit out of the work; that they had decided to fix a uniform price of 80 cents a thousand, so that all persons using the stamps could derive the same benefit from them, or in other words to prevent advantage being given to one person over another, and that with this in view it had been decided to restrict the contracts to those who had them and not to receive applications after the 25th day of May, 1899. During the operation of the claimant's contract claimant made a net profit in its business approximately of $4,000, and it continued its full force and the same extent of rental space and could have performed the amount of work it claims to have been lost to it by the wrongful action of the defendants, with only the additional expense of incidental expenditures.

Stipulation: It is admitted that the claimant fully performed its contract.

Cross-examination by Mr. PRADT:

1. Cross-question. The contract of the claimant in this case, to which you have referred in your deposition, was on a printed blank, was it?

Answer. Yes.

2. Cross-question. Is this a blank similar to the one used for that purpose [handing paper to witness]?

Answer. That is the one, I should say.

3. Cross-question. Look that over and see if that is what it purports to be—a true copy of that contract.

Answer (examining paper). It appears to be a copy.

Mr. PRADT. Defendants offer in evidence the paper just shown to the witness as defendants' Exhibit A.

54 4. Cross-question. You have referred to a former contract for imprinting stamps with the Government in your deposition. Was that the contract of the present claimant?

Answer. It was the contract of the present claimant but under a different name.

5. Cross-question. Was that not a contract between the Commissioner of Internal Revenue and David Milliken, jr., & Co., of New York?

Answer. I think it was; yes.

6. Cross-question. Look over that and see if that is the contract [handing paper to witness].

Answer. That is the contract.

7. Cross-question. It was, then, the contract of David Milliken, jr., & Co.?

Answer. Yes.

8. Cross-question. That was a partnership, was it?

Answer. Yes.

9. Cross-question. Who composed the partnership?

Answer. David Milliken, jr.,——

10. Cross-question. Is that yourself?

Answer. Yes; and Emory N. Down and William B. Orcutt.

11. Cross-question. And that firm had been in business for some time?

Answer. No; it never had been in business before just prior to the making of this contract.

12. Cross-question. The contract which I have just referred to?

Answer. Yes.

13. Cross-question. Of David Milliken, jr., & Co.?

Answer. Yes.

14. Cross-question. In that contract there was a different provision regarding the compensation than in the contract of the claimant in this case, was there not?

Answer. Yes.

15. Cross-question. And there was a different provision as to the amount that was to be paid for superintending and counting the stamps?

Answer. Yes.

16. Cross-question. Do you remember how much it was in the first contract?

Answer. It was $2,500 per annum, being $1,600 for the agent's salary and $900 for the salary of the counter.

17. Cross-question. After you had received the communication from the Treasury Department (Exhibit D. M., No. 1) you ascertained from that communication that the compensation for imprinting stamps would be 80 cents per thousand under certain circumstances and $1 per thousand under others, didn't you?

Answer. Yes.

18. Cross-question. And that, you perceived, was a change from the compensation of the contract that you were then working under?

Answer. It was a change; yes.

19. Cross-question. And it also notified you that the salaries you would have to pay for supervision, etc., would be $3,400 instead of $2,500?

Answer. Yes.

55 20. Cross-question. Those are two matters in which you felt a good deal of pecuniary interest, or at any rate you felt a pecuniary interest in those two matters?

Answer. I felt a pecuniary interest in the change to 80 cents a thousand being fixed. I don't know I felt a pecuniary interest in the addition of the $900.

21. Cross-question. You felt an interest in it?

Answer. I did not consider that at all. I considered it——

22. Cross-question. $900 is $900?

Answer. Yes; I considered that.

23. Cross-question. You don't find that on the street every day?

Answer. No.

24. Cross-question. And if you did not have to pay that extra $900 you would, of course, have had $900 more profit, would you not?

Answer. Exactly.

25. Cross-question. When you wrote your letter of acceptance of the terms of this communication just referred to, from the Commissioner of Internal Revenue, it was signed, "David Milliken, jr., & Co.?"

Answer. Yes.

26. Cross-question. Because that company was then under contract with the Government?

Answer. Yes.

27. Cross-question. It was because that company was then under contract that it received this communication from the Commissioner, wasn't it?

Answer. Yes.

28. Cross-question. Because that communication was addressed to contractors for imprinting stamps?

Answer. Yes.

29. Cross-question. As a matter of fact, although in your communication you notified the Commissioner that David Milliken, jr., & Co. wished to make a new contract for the succeeding year, that partnership did not make the contract, did it?

Answer. No.

30. Cross-question. But instead of that the present claimant here, the Milliken Imprinting Company, made the contract?

Answer. Yes.

31. Cross-question. And were permitted to make it?

Answer. And were permitted to make it.

32. Cross-question. Although the Milliken Imprinting Company, as such, had not been a contractor at the time it was permitted to make this contract?

Answer. Yes.

33. Cross-question. In this letter of application or acceptance that I have just referred to, signed by David Milliken, jr., & Co., to the Commissioner of Internal Revenue, dated May 25, 1899, attention was called particularly to the salaries to be paid and the compensation to be received for the imprinting. No reference was made in that communication, by specific mention, to the statements made in the Commissioner's letter regarding the time for receiving applications, nor to the fact that such communication recited that "no application for contract to imprint stamps for period named would be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government." That is so, is it not?

56 Answer. That is so. It speaks for itself.

34. Cross-question. And is that so because you did not consider it necessary to refer to that?

Answer. I did not consider it relating directly to the subject-matter of the contract. I considered it in my mind in making the application.

35. Cross-question. I did not ask that.

Answer. I had considered it.

36. Cross-question. My question relates to the omission to refer to those matters in your letter.

Answer. Yes; it speaks for itself.

37. Cross-question. And you say, as I understand you, "I did not consider it relating directly to the subject-matter of the contract?"

Answer. Yes.

38. Cross-question. After you received the contract in duplicate, as I understand, was it?

Answer. Yes.

39. Cross-question (continued). Which was executed by the claimant company, did you look at it at all to see whether it contained provision as to your compensation—the new provision?

Answer. No, I didn't look at it.

40. Cross-question. Did you look at it to see whether it contained the new provision as to what you should pay for superintending and counting, $900 more?

Answer. No.

41. Cross-question. You did not look at that?

Answer. No, I did not read the contract at all.

42. Cross-question. Matters which you thought worth especial reference to in the letter of May 25, you did not think worth a glance at in the contract to see whether the contract was made in accordance therewith?

Answer. Oh, yes; I did.

43. Cross-question. Why didn't you do it?

Answer. I did it, and I was sure Mr. Johnson had included it.

44. Cross-question. You say you did not consider it worth a glance into the contract afterwards?

Answer. No; because I had been assured that the contract contained those changed provisions.

45. Cross-question. So that is your way of doing business, to take the word of somebody else in a matter of that kind?

Answer. In a matter of that kind; yes.

46. Cross-question. As to whether a contract contains important provisions or not?

Answer. Yes; because having been told that the contract contained those provisions, which were as you might say against my own interests, I was perfectly satisfied to accept the others that were in there.

47. Cross-question. Although he might be mistaken about that?

Answer. Although he might be mistaken about that.

48. Cross-question. That is the way you do business?

Answer. I didn't say that. That is not a proper question.

49. Cross-question. Is that your way of doing business?

Answer. That is the way I did business in this case.

50. Cross-question. I want to know is that your way of doing business in this case?

The WITNESS. I object to the question.

57 51. Cross-question. You can object, but I want an answer. Is that your usual way of doing business?

Answer. Such business is not usual with me, so I can not answer the question.

52. Cross-question. Is it your usual way to take the assurance of the party on the other side as to the contents of a written contract you are going to sign?

Answer. I can not answer the question because this was more a matter of the renewal of the contract, and the terms and provisions——

53. Cross-question. That is not an answer to the question.

Answer. I think it is, Mr. Pradt.

54. Cross-question. I am not asking you about this contract. I am asking you about your usual method of dealing with contracts which you are to sign.

The WITNESS. I object to the question as being immaterial, incompetent, and irrelevant.

55. Cross-question. When you signed this contract you signed it for the Milliken Imprinting Company, didn't you?

Answer. Yes.

56. Cross-question. Were there other interests there besides your own?

Answer. Yes.

57. Cross-question. And you allowed your confidence in Mr. Johnson as to what the contract contained to control you in signing a contract that would bind them, without weighing your duties to the other members of the corporation in the matter, did you?

Answer. Well, I would not put it that way. They were thoroughly familiar with it.

58. Cross-question. Who?

Answer. Those who were associated with me. There were only two men associated with me.

59. Cross-question. Did the other members of this corporation know what was in this new contract?

Answer. Only except what I told them. They were familiar with the communcations in regard to the contract.

60. Cross-question. And you knew nothing about this new contract except what Johnson told you?

Answer. That is all.

61. Cross-question. And it might have been a contract for only 1 cent a thousand, or that you were to pay $50,000 to the Government, for all you knew?

Answer. Yes; for all I knew.

Question. And you did not, even for the interests of your associates in the corporation, take the pains to ascertain whether Johnson was correct in his understanding of it or not; is that right?

Answer. Yes; that is right.

62. Cross-question. You are a lawyer?

Answer. Yes.

63. Cross-question. How long since were you admitted to practice?

Answer. About twenty-seven years ago, nearly.

64. Cross-question. What other business have you been in besides this you are now engaged in?

Answer. No other business except the practice of law.

65. Cross-question. This printing business is a side issue?

58 Answer. Yes.

66. Cross-question. Did the Milliken Imprinting Company make any money on their contract?

Answer. Yes; $3,000 or $4,000.

67. Cross-question. Did they make as much as the David Milliken Company did?

Answer. David Milliken, jr., & Co., on their contract, lost considerable money.

68. Cross-question. Because they had to establish the plant and had cutting in prices which was not prevented in the first contract, being left to individual bargain?

Answer. Yes; cutthroat business. I want to say one thing in explanation: Prior to the granting of any contracts I was informed that the Secretary of the Treasury had decided to grant the contracts for this work only to individuals and not to partnerships or firms. I then procured letters of indorsement from various persons to be presented to the Secretary of the Treasury in connection with my application for a contract which I was about to make, which therefore recommended to his consideration me personally, individually. Thereafter I was again informed that the Secretary had decided to issue these contracts only to copartnerships or firms, and then, as my letters of recommendation to the Secretary referred to me individually, I made my application in my individual name and company, having formed a copartnership then to meet the requirements of the Secretary of the Treasury. When I made application for the contract in the suit at bar I made the request to the Commissioner of Internal Revenue, but also conferred with Mr. Johnson regarding the substitution of the name, the Milliken Imprinting Company, in the place of David Milliken, jr., & Co., which is composed of the same interests, and which was done merely to protect the interests to a greater extent than a copartnership could do, and that this permission to substitute the name was granted, but the parties were identical and the same.

69. Cross-question. When was this claimant corporation formed?

Answer. I can not just state now when it was. It was formed a short time prior to the granting of this contract.

70. Cross-question. And under the laws of the State of New York?

Answer. Under the laws of the State of New York; yes.

71. Cross-question. And thereafter the liability of the parties, who, you say, were the same as those in the company called David Milliken, jr., & Co.—that is, of the stockholders of this corporation, who, you say, were the same as the persons who composed the preceding partnership, was changed from a partnership liability to the liability of stockholders simply, was it not?

Answer. Yes; that was so, but the parties were the same.

General interrogatory. The examination by counsel being concluded,

the witness, in compliance with the rule of court requiring him to state whether he knows of any other matter relative to the claim in question, and if so, to state it, says:

Not at present.

By Mr. PRADT:

Question. Did Mr. Johnson, in the conversation you spoke of regarding the provisions of this second contract, say that it contained anything in reference to the date when applications would be received,
59 or anything in reference to the fact that the contracts were only going to be made with the present contractors?

Answer. He made no specific reference to anything. I asked the question of him, "What does this contract contain; just the changes made necessary by that letter?" And he said, "That is all." There was no distinctive reference to anything at all.

DAVID MILLIKEN.

DISTRICT OF COLUMBIA, *ss:*

I, John A. Sweeney, a notary public in and for the District of Columbia, do hereby certify that the foregoing deposition of David Milliken was taken down by me in the presence of and from the oral statements of the said witness at the time and place designated in the caption thereof, the said witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relative to said cause, and after the same was reduced to typewriting it was read over and subscribed by the said witness in my presence.

I further certify that I am not of counsel for either party to this suit or in any manner interested in the result thereof.

[SEAL.] JOHN A. SWEENEY,
Notary Public, District of Columbia.

Deposition of Ellis C. Johnson, for defendants, taken at the city of Washington, D. C., on the 23d day of January, A. D. 1904.

Claimant's counsel, David Milliken; defendants' counsel, Hon. Louis A. Pradt.

ELLIS C. JOHNSON, having been produced as a witness on behalf of the defendants, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to said cause, and thereupon deposed and said that his name is Ellis C. Johnson; that his occupation is chief of the stamp division, Internal Revenue Bureau, Treasury Department; that he is 45 years of age; that his place of residence is Washington, D. C.; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in said cause, and that he is not related to the claimant.

And thereupon the said Ellis C. Johnson was examined by the counsel for the defendants, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. PRADT:

1. Question. How long have you held your official position?

Answer. I have held my present official position about seven years.

2. Question. You held it, then, at the time that the contract referred to in the claimant's petition of June 19, 1899, was executed?

Answer. Yes, sir.

3. Question. You are perfectly familiar with the contents of that contract?

Answer. Yes, sir; I am.

4. Question. Mr. Milliken states that he obtained from you the contract in duplicate which he afterwards executed. You may state when and how those contracts had been prepared.

60 Answer. I prepared the original contracts in 1898. Subsequently, when it was desirous of reducing the number of contractors, and making the matter of imprinting internal-revenue stamps uniform throughout the United States by contractors, the changes in the contract were made. It was just prior to the 1st of July, 1899, when the contracts were printed. Then the contracts were filled up by the Commissioner, omitting the signatures, and forwarded to the several parties who had signified their willingness to sign the contracts for the next year.

5. Question. In making out the new contracts for the year 1899, that would be called 1899 and 1900?

Answer. Yes.

6. Question. The printed text of the former contracts was preserved, I suppose, except in so far as it differed from the new provisions which had been agreed upon in the Commissioner's office as compensation for imprinting and the salaries to be paid by the contractors?

Answer. Practically so. The phraseology might have been changed in a few places.

7. Question. But there also were substantive changes made?

Answer. Yes.

8. Question. State whether or not after these new blanks had been prepared for the second contracts—about how many new contracts were to be made?

Answer. Some twenty-five or thirty; I don't remember the exact number.

9. Question. And, as I understand, the blanks were prepared precisely alike for all the new contracts; was that right?

Answer. Yes.

10. Question. After they had been prepared were they presented to the attention of the Commissioner of Internal Revenue, who signed them afterwards?

Answer. Yes, sir.

11. Question. Do you know whether or not he read them?

Answer. I think he did. I went over the matter with him and conferred about the terms and conditions, as I did about official business of that importance at all times.

12. Question. In preparing these contracts no reference was made in any way to the fact stated in the circular letter to contractors of April 25, 1899, of the Commissioner of Internal Revenue, that applications would not be received except from present contractors, nor was any reference made to the statement therein contained that each application must be accompanied with a guaranty of at least two responsible persons, and that in case the contract was entered into an acceptable bond must be furnished in the sum of $25,000 for the faithful performance thereof,

nor was any reference made to the statement therein contained that applications would be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until 12 m. May 25, 1899?

Answer. No reference was made to those things.

13. Question. Were such matters omitted from that contract by mistake on your part?

Answer. No, sir.

14. Question. So far as you know, was there any intention on the part of the Bureau of Internal Revenue or of the Treasury Department to put any of those provisions into these contracts?

61 Answer. There was no intention, so far as I know, to include any of them in the contract.

15. Question. Do you remember Mr. Milliken's question as to what was contained in the contract as he has testified about to you and addressed to you?

Answer. I remember several conversations with Mr. Milliken about the contracts and the method of doing the business, but I have no distinct recollection of the specific matter alleged being discussed in the conversation he refers to.

16. Question. Did you make any statement to him regarding the contents of this second contract by which you intended to have him rely upon that statement as to such contents solely?

Answer. I did not. The letters and correspondence about the contracts speak for themselves. I presented no extraneous matters, so far as I am advised, except in the conversation about the method, or something of that kind.

17. Question. Did you at any time make a statement to him regarding the contents of this intended contract, which you intended he should rely on to the exclusion of his finding out himself what was in the contract?

Answer. I did not.

18. Question. He says that he asked you if it contained the changes referred to in the circular letter, and that you stated it did and that was the only change. Assuming that his recollection as to that is correct, had you any intention of assuring him that the contract contained statements as to the date when applications would be received and that contracts would be let only to present contractors?

Answer. I did not.

19. Question. As a matter of fact it did not contain, as you already testified, any such statements?

Answer. It did not contain any such statements.

20. Question. Do you know when the contract which has been referred to by the witness here, Mr. Milliken, was let to the American Imprinting Company?

Answer. Subsequent to the 25th day of May and before the 1st of July, but the date I am not clear upon. I think it was signed by the American Imprinting Company on the 19th or 20th day of June.

21. Question. Do you know whether or not the application of the American Imprinting Company was received prior to May 25, 1899, or subsequent?

Answer. Subsequent—that is, to the best of my recollection.

Cross-examination by Mr. MILLIKEN:

1. Cross-question. Mr. Johnson, you mentioned that the changes in this contract in the suit at bar were only those that had been agreed upon. Now, will you kindly state who agreed to the changes?

Answer. The Commissioner of Internal Revenue and myself.

2. Cross-question. You had had several conversations with the Commissioner, had you not, prior to the issuing of the communication dated April 25?

Answer. Yes.

3. Cross-question. Now, were not those conversations held for the purpose of formulating the provisions for the new contracts, as shown by that letter?

Answer. Conversations relating to the letter?

62 4. Cross-question. No; about the new contracts. You had several conversations with him prior to April 25, regarding the provisions of the new contract?

Answer. Yes, sir.

5. Cross-question. Then at that time you and the Commissioner agreed, as therein stated, did you not, in the letter of April 25, to restrict the contracts to those who had them on that date? That was your intention, was it not?

Answer. That was the intention when the letter was written.

6. Cross-question. And your intention, and the Commissioner's, furthermore, was not to receive applications after 12 o'clock on the 25th day of May, was it not?

Answer. Yes.

7. Cross-question. And the intention, therefore, was that the existing contracts with those that had contracts were the only ones who should have a renewal of their contracts, or contracts for the ensuing year? That was the purpose of it, was it not?

Answer. That was the purpose of that letter.

8. Cross-question. Now, at the interview that I mentioned that I had with you regarding the contents of the contract, there was no intention on my part to mean or say that you misled me in any way at all; but the question put by Mr. Pradt rather assumed that. Do you recall any conversation that I had with you about that time, on the 25th day of May, after my contract had been awarded to me; or let me put it this way: Do you recall any conversation, as I have related, in which I stated or I had asked you if the new contracts contained anything but the changes provided for or mentioned in the letter of April 25—do you recall any such conversation as that?

Answer. I recollect a number of conversations you had with me at different times affecting this contract and this work, but I don't recollect any conversation in which the language used by you or the answer assumed by me was made or given.

9. Cross-question. Are you prepared to state that no such conversation may not have been had?

Answer. I am not.

10. Cross-question. Now, Mr. Johnson, you say that after you drew up this contract—that is, the blank form of contract—you presented it to the Commissioner of Internal Revenue before execution?

Answer. Yes.

11. Cross-question. You say you don't know whether he read it or not. Do you recollect distinctly whether he did read the contract or not, or did he accept your statement in regard to it?

Answer. I don't recollect whether he actually read the contract. I was impressed with the idea that he did.

12. Cross-question. He did read the whole contract?

Answer. I was impressed with the idea that he did. He was a careful business man, and usually in matters of that kind he would run over things which I did, either with me or by his comparing it or reading it himself.

13. Cross-question. You say he left the preparation of that contract to you?

Answer. The drafting of the contract, yes.

63 14. Cross-question. And when you submitted it to him, do you recollect what you said to him? You don't know whether he read the contract or not, do you?

Answer. I do not.

15. Cross-question. Now, Mr. Johnson, was the American Imprinting Company printing stamps under contract with the Government on the 25th day of April, 1899?

Answer. It was not.

Redirect examination by Mr. PRADT:

1. Redirect question. Were you, at the time of the conversations that you had with Mr. Milliken, that he has referred to, authorized in any way by virtue of the duties of your official position, to make statements to intending contractors as to what the contracts they were going to sign contained, for the purpose of having them rely solely upon what your understanding was of the contents of those contracts?

Answer. I was not.

2. Redirect question. Had you any intention of assuming to do anything of that sort?

Answer. I had not.

3. Redirect question. You may state, so far as you recollect, whether or not it was the custom of the Commissioner to read over important papers which he had to sign?

Answer. It was.

4. Redirect question. I suppose there are purely routine matters and letters which he could not always read and did not?

Answer. Such matters as printed blanks which he had been familiar with before in the line of daily communications; of course he would permit them to go through.

5. Redirect question. And the number of new contracts was about twenty-five?

Answer. My recollection is that we had then about twenty-five.

6. Redirect question. But the blanks were all alike?

Answer. All alike.

7. Redirect question. All that was necessary was to read one only in order to know the provisions that they would all have?

Answer. Yes.

8. Redirect question. Was the business an important business?

Answer. It was.

9. Redirect question. Was it very important business?

Answer. It was very important.

10. Redirect question. Was it considered in the office an important matter to have this compensation for imprinting made uniform?

Answer. It was considered important to have it made uniform throughout the United States.

11. Redirect question. And the new contracts provided for that, did they?

Answer. Yes.

12. Redirect question. Which the old ones did not?

Answer. Yes.

13. Redirect question. Was it considered a matter of some importance to have the salaries to be paid by the contractors to the Government employees increased?

Answer. That was considered important. It gave additional supervision.

64 14. Redirect question. It implied more Government employees?

Answer. Yes; more employees.

15. Redirect question. And those matters, you say, had been discussed in the office of the Commissioner of Internal Revenue; by the Commissioner, amongst others, prior to issuing that letter of April 25?

Answer. Yes, sir.

16. Redirect question. And you submitted to him a new contract containing those two new and important provisions, did you?

Answer. I did.

Recross-examination by Mr. MILLIKEN:

1. Recross-question. Mr. Johnson, what was the object, if you know, of restricting the new contracts to those who had them at that time, the 25th of April?

Answer. It was to prevent the increase in the number of contractors as much as anything else There might have been some other purpose.

2. Recross-question. Was it not the intention of the Government also in that regard to secure a profit to the contractors by fixing a uniform price and limiting the number of the contracts?

Answer. I don't think that was one of the principal objects.

3. Recross-question. No: particular objects, but did it have any bearing upon the restriction of the number of contractors?

Answer. It was to prevent discrimination among those who were imprinting stamps, and making the instrument upon which they were imprinting, and concealing the price of that in the manufacture in the instrument itself. In other words, it was done for the purpose of preventing the constant annoyance that the office was subjected to, and the Department, and the criticism it was subjected to on account of the manner of which some of the contractors were doing business.

4. Recross-question. And to overcome that it was determined to restrict the number of contracts?

Answer. To overcome that it was determined to fix the price and compel them to adhere to it.

5. Recross-question. Was it or was it not the intention of the

Department in restricting the number of contracts to enable the contractors who made the contracts to make a profit out of the work?

Answer. As I remember it now, I don't think the Government was particularly interested in the contracts of the contractors. It was interested in the maintenance of good service and the prevention of any cause of criticism by the taxpayers throughout the country.

6. Recross-question. There had been a great deal of criticism in the way of cutting prices?

Answer. Yes.

7. Recross-question. And that was considered by the Department?

Answer. It was.

8. Recross-question. And was it not partly the intention of the Deparment to fix that so that the contractors could make something out of the work?

Answer. I don't think I could say positively that that was any part of the purpose of the Government in fixing that, because the Government was very much interested in the large number of contractors more than the profits growing out of it.

65 9. Recross-question. You can not state that the Government had in view at all any intention of making these contracts in such a way that the contractors could make a profit out of it?

Answer. I have no recollection of that.

10. Recross-question. Now, why was the additional counter added to each contract? Was there any reason for it that you know?

Answer. I think there were two purposes in it. Primarily it was to increase the expense so that the business would be reduced within legitimate bounds. On the other hand it was urged that some large imprinting establishments had not sufficient supervision with one counter, and it was to assist them along.

11. Recross-question. Had that been seriously urged by anyone?

Answer. I think it had been considered by all as important.

12. Recross-question. By whom was it urged?

Answer. It was not urged by the contractors that I know of.

13. Recross-question. It was done, as you stated, for the purpose of reducing the number of contractors, was it not, or was to that end?

Answer. Yes.

General interrogatory: The examination by counsel being concluded, the witness, in compliance with the rule of court requiring him to state whether he knows of any other matter relative to the claim in question, and if he does to state it, says:

I do not.

E. C. JOHNSON.

67 VI.—*Reply of Treasury Department to claimant's call.*

Authorized to imprint stamps on bank checks, drafts, etc.

[David Milliken, jr., and Company, 22 Thames street. Telephone, 1590 Cortlandt.]

NEW YORK, *May 25, 1899.*

Hon. GEORGE W. WILSON,
Commissioner of Internal Revenue.

SIR: We have now the privilege conferred by the honorable Commissioner of Internal Revenue to imprint stamps on checks, drafts, etc., and

would most respectfully make application to you for a contract to continue the same for the period of one year, commencing July 1, 1899, and in accordance with your official communication dated April 25, 1899, we to pay salaries aggregating thirty-four hundred dollars for one Government stamp agent and two counters, and to receive as compensation for imprinting stamps the sum of eighty cents per thousand when imprinted upon sheets containing five or more stamps and one dollar per thousand when imprinted upon sheets containing less than five stamps to the sheet.

We beg to attach guarantee of American Surety Company, of New York, to furnish the required bond in the sum of $25,000 for the faithful performance of the contract, and to respectfully refer you to letters filed in your office in June, 1898, and which accompanied our application for the original contract, as to our standing and integrity.

We have the honor to be

Yours, very respectfully,

DAVID MILLIKEN, Jr., & Co.

69 [Walter S. Johnston, president, American Surety Company of New York. Home Office Building, John F. Rodgers, 1423 F street NW.]

WASHINGTON, D. C., *May 23, 1899.*

The American Surety Company of New York, by its resident vice-president, hereby consents to furnish proper and sufficient surety in the event of the contract for imprinting revenue stamps upon bank checks, drafts, etc., be awarded to Messrs. David Milliken, jr., & Company, of New York, said bond being in the sum of $25,000.

Resident vice-president.

JOHN F. RODGERS.

[SEAL.]

70 VII.—*Report of Treasury Department—Filed by Defendants, January 27, 1904.*

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE.
Washington, D. C., April 25, 1899.

To the contractors for imprinting stamps:

In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps:

Each contractor will be required to pay salaries aggregating thirty-four hundred dollars ($3,400) per annum for one Government stamp agent and two counters, payable monthly.

As compensation in full for imprinting stamps the contractor shall charge all persons requiring the same the sum of eighty cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and one dollar per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet. In order to secure absolute uniformity in price these charges shall be rigidly adhered to, and any evasion or attempted evasion of the express terms hereof shall be deemed a violation of the terms of the contract.

No application for contract to imprint stamps for period named will be considered from any person, firm or corporation not now engaged in imprinting stamps under contract with the Government.

Each application for contract must be accompanied by a guarantee of at least two responsible persons that in case contract is entered into an acceptable bond will be furnished in the sum of twenty-five thousand ($25,000) for the faithful performance thereof.

The Commissioner reserves the right to reject any or all appli-
71 cations, and to cancel any contract wherever and whenever it shall appear to the interests of the public and the Government to do so.

Applications will be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until 12 m. May 25, 1899, such applications to be carefully sealed and marked "Applications for contract for imprinting internal-revenue stamps" and addressed to the Commissioner of Internal Revenue.

G. M. WILSON,
Commissioner.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, December 15, 1903.

The honorable the SECRETARY OF THE TREASURY.

SIR: Replying to your reference on letter of Hon. L. A. Pradt, assistant attorney-general, under the date of 11th instant, requesting a statement from this office in the case of the Milliken Imprinting Company vs. The United States, pending in the Court of Claims, I have the honor to advise you that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, did, on the 25th day of May, 1899, award a contract to the said Milliken Imprinting Company for the imprinting of internal-revenue stamps on blank checks, drafts or other documents, for the fiscal year commencing July 1st, 1899. The contract was awarded in accordance with the terms of a circular letter addressed to "Contractors for imprinting stamps," under date of April 25th, 1899, by the Commissioner of Internal Revenue. The contract aforesaid was duly signed by the contracting parties on June 19th, 1899.

Subsequent to the 25th day of May, 1899, a similar contract
72 was awarded to the American Imprinting Company, a corporation doing business in the city of New York, which contract was also duly signed on June 19th, 1899.

A copy of the circular letter aforesaid and a copy of the contract with the Millikin Imprinting Company, together with the petition of claimant and the letter of Assistant Attorney-General Pradt, are herewith enclosed.

Respectfully,

J. W. YERKES,
Commissioner.

73 VIII.—*Opinion of the court—Filed Dec. 19, 1904.*

THE MILLIKEN IMPRINTING COMPANY v. THE UNITED STATES.

OPINION.

WELDON, J., delivered the opinion of the court:

The petitioner is a corporation created and existing under the laws of the State of New York, with its place of business in the city of New York.

On the 19th day of June, 1899, the Commissioner of Internal Revenue entered into contract with the claimant under the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898 (30 Stat. L., sec. 25, p. 445), by which contract the claimant was to print internal-revenue stamps for the defendants of certain denominations at the price of 80 cents per thousand, which contract is annexed to the petition and made a part of the same, marked "B." The contract was to commence on the 1st day of July, 1899, and continue for the period of one year, with the right of either party to terminate upon certain conditions.

On the 25th of April, 1899, the Commissioner issued a notice as follows, to wit (Exhibit A): "To contractors for imprinting stamps," in which it is provided that the year in which the stamps were to be printed should commence on the 1st day of July, and that in addition to the provisions in contracts now existing there shall be added in substance as follows: That each contractor will be required to pay salaries aggregating the sum of $3,400 for one Government stamp agent and two counters, payable monthly; that contractors shall charge all persons requiring the same the sum of 80 cents per thousand; that "no application for contract to imprint stamps for a period named will be considered from any person, firm, or corporation not now engaged in printing stamps under contract with the Government." Then follows other provisions not necessary to be quoted. Said notice is annexed to the petition and marked "Exhibit A."

It is alleged that by mutual mistake and accident said last paragraph was omitted from the contract dated on the 19th day of June, 1899, and known as Exhibit "B." It is also alleged that there is omitted from said contract, by accident and mutual mistake, the provision that applications will be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until May 25, 1899.

74 It is also alleged, as an amendment to the fifth paragraph of the original petition, that the said contract of July 19, 1899, was accepted by your petitioner without examination or reading, upon the assurance of the representative of the defendants that it contained all the provisions of the preliminary contract.

The seventh paragraph of the original petition avers in substance that several weeks after the 25th of May aforesaid, in violation of the said contract, the defendants did receive and grant application for a similar contract to the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the Government on the 25th of April, 1899.

It is alleged that many of the persons composing the American Imprinting Company had been, before the 1st of July, 1899, customers of the claimant in the printing business, and satisfied with the work performed before that time by the claimant, and would have continued to have the claimant do their work; but that, in consequence of the defendants having awarded a contract to the said American Company, the said customers procured their work to be done by said company, to the prejudice and damage of the right of the claimant.

By the amended petition it is charged that the loss and damage to the claimant during the period for which said agreement was made with the claimant amounted to the sum of $20,584.99, in the way of a loss of profits in not being permitted to perform the work which had been diverted from the claimant to the American Imprinting Company, and also the sum of $500 for loss on press.

On the 25th of May, 1899, the claimant company addressed to the Commissioner of Internal Revenue a communication marked "Exhibit D," made a part of the petition, in which it is in substance stated that application is made for a contract to continue for one year from July, 1899, in accordance with official communication dated April 25, 1899, to pay salaries aggregating $3,400, for one Government agent and two counters, and to receive the sum of 80 cents per thousand and $1 per thousand, depending on the size of the sheets. Attached thereto is guarantee of the American Insurance Company to furnish bond in the sum of $25,000 for the faithful performance of the contract.

The prayer of the amended petition, founded on the foregoing allegations, is that the contract aforesaid be amended by the insertion of the following:

"And it is further agreed by and between the parties hereto that the party of the first part shall not receive, consider, or grant, and has not received, considered, or granted any application for a similar contract to imprint stamps as hereinbefore described and provided, from any person, firm, or corporation, which was not actually engaged in imprinting said stamps under contract with the party of the first part on the 25th day of April, 1899." And also that a judgment be rendered against the United States in the sum of $21,084.99.

This proceeding is based upon the first section of the act entitled "An act to provide for the bringing of suits against the Government of the United States," commonly known as the Tucker Act (24 Stat. L., p. 505). In that act it is provided, in defining the jurisdiction of the courts of the United States in suits against the United States, that they shall have jurisdiction: "First, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions; or upon any regulation of an executive department; or upon any
75 contract, expressed or implied, with the Government of the United States; or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

It is contended on the part of the claimant that under said provision the Court of Claims has complete and ample jurisdiction to correct the contract if a common and mutual mistake was made by the parties in

the reduction of the contract to writing, and that, having jurisdiction for that purpose, the court has full jurisdiction and authority to settle and adjudicate the rights of the parties on the contract as amended, as their rights may appear from the facts of the case as established by the proof. It is insisted on the part of the defendants that the court is without jurisdiction to reform the contract as asked by the prayer of the petitioner.

The question of the jurisdiction being preliminary to all other questions, the court must determine that question before reaching the facts and the law upon the merits of the controversy. Prior to the passage of the Tucker Act it must be conceded that the court was without jurisdiction except where given by a special act of Congress; but in the passage of the Tucker Act, which was intended to define accurately and enlarge the jurisdiction of this court, the Congress have employed an enlarged statement of the jurisdiction of the court in this, to wit, "in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

In support of the contention that the court has jurisdiction the counsel for the claimant relies on the terms of the Tucker Act and the decision of this court in the case of the South Boston Iron Works v. The United States (34 C. Cls. R., p. 200), in which it is said: "Since the passage of the act of 1887 the Court of Claims has equity power to reform a contract so to effectuate the full intention of the parties." The authority of that case is questioned by the attorney for the defendants. The proceeding involved the question of the reformation of the contract, which was in the case by the pleadings of the claimant and by the contention of the parties, was material in the determination of the rights of the litigants, and was decided by a full bench.

In the case of Harvey v. The United States (105 U. S. R., p. 671; 8 C. Cls., 501) the court took jurisdiction under a special statute (19 Stat. L., 490), the law providing: "And to that end jurisdiction is hereby conferred on said court to proceed in the adjustments of the accounts between said claimant and the United States, as a court of equity jurisdiction, and may, if according to the rules of equity jurisprudence, in its judicial discretion reform said contract and render such judgment as justice and right between the claimants and said Government may require." It was held in substance by the Supreme Court that it was competent for the Court of Claims, proceeding as a court of equity jurisdiction under the authority of the statute, to reform the contract and to determine and adjust the accounts of the parties arising thereunder. The legal condition in that case and this case differs in this, that in the Harvey case the court proceeded under a special act giving equitable jurisdiction, and in this case the proceeding is under a general statute, which, as it is claimed, gives equitable power to the court as to the subject-matter and relief sought by the claimant.

76 In support of the theory that the court is without jurisdiction counsel cites the case of Jones v. The United States (131 U. S. R., p. 1). That was a proceeding to enforce a demand or claim against the United States by compelling an executive officer to do and perform a certain act, to wit, to deliver to the plaintiff a patent for public land which, as he alleged, he had purchased from the United States. The

court held that under the Tucker Act the district and circuit courts and Court of Claims of the United States had no jurisdiction and refused the relief by reversing the decree. It is said: "It seems, therefore, that in the point of providing only for money decrees and money judgments the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go further than this."

The Jones case (supra) was not to recover a money judgment, but the performance of a specific act of executive duty. This case is wholly for the purpose of recovering a judgment against the United States for the violation of a reformed contract. The relief is not in the abstract, so far as enforcing a pecuniary obligation is concerned, but directly bearing upon such an obligation. In the Jones case (supra) much stress is laid on the subject-matter of the litigation, to wit, the public lands. In justification of the conclusions at which the court arrived it is said: "We should have been somewhat surprised to find that the administration of vast public interests like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts, which it surely would have been if such a wide door had been opened for suing the Government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine."

The grant of judicial power in the Harvey case (supra) is:

"Jurisdiction is hereby conferred on said court to proceed in the adjustment of accounts between the claimant and the United States as a court of equity jurisdiction, and may, if according to the rules of equity jurisprudence, in its judicial discretion reform said contract and render such judgment as justice and right between the claimants and said Government may require." The court was directed and empowered to proceed in the adjustment of the rights of the parties "as a court of equity jurisdiction."

That is the grant of power in substance, and as incident to that grant the Supreme Court decided that it clothed (in connection with the other provisions of the statute) this court with complete equity jurisdiction to settle the questions of controversy incident to the subject-matter of litigation and affected by such reformation.

Recurring to the provisions of the Tucker Act, "in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

If the United States were suable in a court of equity like an individual, could any question arise as to the jurisdiction of a court of equity to maintain a suit in chancery for the reformation of the contract upon the grounds alleged in the petition and the subject-matter of this suit?

This court having equity power by the Tucker Act, is not its jurisdiction as complete as it was in the Harvey case under the special act giving the court jurisdiction? Equity jurisdiction is given by both,
77 and the reformation and correction of a contract is among the landmarks of equitable jurisdiction of courts of chancery.

In the case of Hearne v. Marine Insurance Company (20 Wall., 490) it is said by the Supreme Court, upon the question of the reformation of

a contract: "The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred." (Kerr on Fraud and Mistake, 419, 420.)

The jurisdiction of the Court of Claims is not general. It may not have the right to grant injunctions or decree the performance of contracts; but where a suit will result simply in a decree for the payment of money it has jurisdiction under the Tucker Act as fully as other courts of equity, and as fully as it has under certain special acts, such as that under which the Harvey case was brought.

Having decided that the court has jurisdiction to reform the contract upon sufficient proof, and the incident right to determine the whole case as to the question of the alleged error and the damages to claimant because of the alleged misconduct of the defendants in violation of the contract as it is amended (if the court determines that a reformation is justified by the proof), we proceed to consider whether the claimant is entitled to a reformation of the contract in the particulars alleged in its petition.

It is contended by the claimant that the proof establishes the fact that both parties, to wit, the Commissioner of Internal Revenue and the agent of the claimant, made a mutual mistake, omitting from the contract the provision as to not letting contracts to persons who on the 25th of April, 1899, had not already subsisting contracts with the United States for imprinting stamps upon checks, etc., and also the omission of the clauses that no bids would be received after noon of the 25th of May, A. D. 1899.

The defendants' counsel insist that the proof is insufficient to establish that a mutual mistake was made, and the contract as written should govern and determine the result in this proceeding. "The law has laid down the fundamental rule that in all cases, if the mistake is clearly made out by proofs, entirely satisfactory equity will reform the contract so to make it conformable to the precise intent of the parties. But if the proofs are doubtful or unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as the full and correct expression of the intent, until the contrary is established beyond reasonable controversy." (Story's Equity Juris., vol. 1, sec. 152.) If the rights of the parties are to be determined by the oral testimony in the case, they might be controlled by the strict rule prescribed in this authority, but the court is not left to the consideration of the oral testimony alone; the advertisement for bids must be considered in the determination of the question as to whether a mistake was made in the reduction of the contract to writing in the form of Exhibit "B."

The evidence as to the making of the written contract on the 25th of June, 1899, is substantially confined to the testimony of Mr. Mil-
78 liken, the agent and president of the claimant company, and Mr. Johnson, chief clerk of the stamp division of the Internal Revenue

Bureau, and by their testimony in connection with the exhibits and circumstances is to be determined the issue as to whether there was a mistake made in the reduction of the original agreement to the terms as they are exemplified in the written contract.

The president of the claimant company testifies that on May 25, 1899, he had an interview with the Commissioner of Internal Revenue, in which the Commissioner asked him whether he intended to make application for renewal of the contract, to which he answered that he so intended, but not until the time approached 12 o'clock, the time for closing; that he did not want to take any chances of any applications being put in by persons who did not have contracts on April 25, 1899, and that the Commissioner assured him that no such application would be received. He was afterwards informed by the Commissioner that his application would be accepted and that the contract would be renewed. The defendants object to this testimony on the ground that the Commissioner was dead at the time the testimony was taken.

The president then called upon Mr. Johnson, chief clerk of the stamp division of the Internal Revenue Bureau, and informed him that his contract had been renewed, and was told by Mr. Johnson that it had been decided that the application of any person who had a contract would be granted. The chief clerk then delivered to the president of the company two copies in blank of the contract to be executed, whereupon the president said: "I presume the only changes from the other contract are those contained in the letter or communication dated April 25, 1899," and the chief clerk answered: "That is all."

The president of the claimant company then took the contracts to New York, and subsequently executed them without reading and returned them to the Commissioner of Internal Revenue. Prior to the 1st day of July, 1899, the president was informed that a contract for the same kind of work had been granted to the "American Imprinting Company." The president then states that said company did not have a contract to imprint stamps on April 25, 1899, and also did not make an application prior to 12 o'clock of May 25, 1899. He examined his contract, and then for the first time discovered that it failed to state that no application would be received from any person, firm, or corporation who did not have a contract on May 25, 1899, and that it did not state that no application would be received after 12 o'clock of said date.

The president then went to Washington and had an interview with the Secretary of the Treasury, and mentioned to him the fact that the American Company had a contract in violation of his agreement. He states that it was admitted by the Secretary that the American Company had a contract, granted inadvertently. The Secretary refused to revoke the contract of said company for the reason that the Commissioner was absent from the city, but said that if it should be violated in any way he would revoke it at once.

The contract of the "American Imprinting Company" was revoked for violation, to take effect November 30, 1899, but was extended, as witness states, to January 1.

The attention of witness, the president, is called to the letter of acceptance by David Milliken, dated May 25, 1899, omitting any reference to
that clause of the contract which recites that "no application
79 for contract to imprint stamps for the period named would be

considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government."

To the inquiry with reference to that contract witness replies: I did not consider it relating to the subject-matter of the contract. I considered it in my mind in making application. I did not consider it relating directly to the subject-matter of the contract; I did not look at the contract when I received it to see what it contained.

In a subsequent examination for the purpose of correcting his testimony he says: Where it appears that it was after I received the contract in duplicate that I did not consider that the omitted provisions related directly to the subject-matter of the contract, what I meant to say was that it was at the time I made application for the contract. In my letter of acceptance, as it appears, it was made in accordance with the circular letter of April 25, 1899, and the matters specifically mentioned by me are only those I claim I was obliged to do.

Upon cross-examination he says in substance: What I meant was that at the time when I considered that the restriction did not relate to the subject-matter of the contract, was when I made the application for the contract and not when I received the contract in duplicate.

Mr. Johnson testifies in substance: I did not at any time make any statement to the agent of the company regarding the contents of the intended contract, which I intended he should rely on to the exclusion of his finding out for himself what was in the contract. I prepared the original contract in 1898. Contracts of 1899 were prepared prior to July, 1899, filled up, omitting signatures, and forwarded to parties who had signified their intention and willingness to sign contracts. There were changes made from contracts of 1898. After such changes were made twenty-five or thirty copies of the contracts were prepared in blank for the new contractors. I went over the contracts with the Commissioner, conferred about terms and conditions, as I did about all business of that importance. No reference was made in the contract as to number of bidders or bond to be furnished, or that no applications would be received after 12 o'clock. Such matters were not omitted from the contract by mistake on my part. There was no intention on the part of the Internal Revenue Bureau to put those provisions in the contracts. I had several conversations with Mr. Milliken as to the method of doing business, but I have no recollection of the matters discussed which he refers to. I made no statement to him as to the contents of the second contract, upon which I intended to have him rely as to such contract. The Commissioner and myself agreed upon the changes to be made. We intended at the time the letter of April 25, 1899, was written to restrict contracts to those who had them on that date; that was the intention when the letter was written. Our intention was not to receive applications after 12 o'clock; it was our purpose not to receive applications after 12 o'clock. I remember conversations with Mr. Milliken, but do not recollect any conversation in which the language used by him was made use of by me. I am not prepared to say that such conversations were not had. I do not recall whether the Commissioner actually read the contract or not. I was impressed with the idea that he did. He was a very careful business man, and in matters of that importance he would run over things which I did, either with me or by his comparing it or reading it him-
80 self. I was not authorized at the time of the alleged contract with

Mr. Milliken to make statements to intending contractors as to what the contracts they were going to sign contained for the purpose of having them rely solely upon what my understanding was of the contents of those contracts.

If the testimony of the president of the claimant company is taken as true it must be conceded that he thought and believed at the time he received the contract from Mr. Johnson, the chief clerk, that the provisions in controversy were in the agreement, and upon the faith of that belief, founded on the assurance of the clerk, he accepted and executed the contract without reading.

It is insisted by counsel for the defendants that he was guilty of negligence in that particular, in not reading the contract, but relying upon the word and assurance of the clerk. While that in the abstract might be considered carelessness, it is not such carelessness as relieves the opposite party from the obligation imposed upon him by his representation of the terms of the agreement. If the United States had been misled or prejudiced by the carelessness of the president of the claimant company it might operate as an estoppel against the company, but in the absence of any such consequences to the rights of the defendants they can not insist that the confidence which he reposed in the statements of the clerk was carelessness upon his part. Mr. Johnson, the clerk, substantially contradicts the testimony of the president of the claimant company in some particulars, in which he says: "I made no statements to him (the president of the claimant company) as to the contents of the second contract upon which I intended to have him rely as to such contract. The Commissioner and myself agreed upon the changes to be made. We intended at the time the letter of April 25, 1899, was written to restrict contracts to those who had them on that date; that was the intention when the letter was written. Our intention was also not to receive applications after 12 o'clock. He remembers conversations with the president of the claimant company, but does not recall any conversation in which the language given by him was used. Mr. Johnson is not prepared to say that such conversations were not had; and does not recollect whether the Commissioner read the contracts or not; but that he usually ran over such things with the clerk by comparing them or reading them himself; that the provisions were not omitted from the contract by mistake on his part.

It is stated by the clerk that he and the Commissioner conferred about the terms and conditions of the contract, that as a result of such conference the contracts were prepared in the form in which they were, and that there was no intention on the part of the Internal Revenue Bureau to put those provisions into the contract.

Both provisions are contained in Exhibit A, which constitutes the basis and terms upon which the claimant company contracted with the United States, and that these terms were important to the interest of the claimant is shown by the fact of the interest which the president of the claimant company took in ascertaining as to whether any persons not then contractors with the United States would be regarded as competent bidders in the letting of new contracts, and the fact that the president did not put in the bid of the company until the exact time that proposals for the contract were to be received; that these provisions, especially

the one with reference to not receiving bids from any person not
81 theretofore contractors, were important is shown by the result of other persons being permitted to make bids in violation of the policy announced by the defendant in the notice to contractors.

The persons forming the American Imprinting Company, who have received upon their contract a large proportion of the printing matter, had been the customers of the claimant during the execution of the former contract, and having succeeded in getting a contract of their own for the company in which they were the stockholders they transferred their patronage from the claimant company to the American Imprinting Company, thereby depriving the claimant company of the profits which it would have derived from the patronage of the stockholders of the new company if the new company had not been organized and had not been successful in bidding for the new issue of stamps.

It was decided by the Supreme Court in the case of Harvey v. The United States (supra) that the formal contract subsequently drawn was intended to embody the terms used in the advertisement inviting proposals for the work; that by such omission the contract varied essentially from the publication of proposals, and that although the contract was drawn in that way it was a mistake against the right of the contracting party, which he had the right to reform, thereby making the contract embody substantially the terms proposed in the notice to bidders inviting proposals.

Applying the principles of law determined in the case of Harvey (supra) to this case, is not the plaintiff company in this proceeding entitled to have the contract executed in the form in which it would have been prepared if the substantial terms had been inserted as its provisions? In this particular there is a remarkable identity with the case of the Equitable Insurance Company v. Hearne (supra). In that case the defendant wrote a letter to the plaintiff offering to insure at a rate named. In this case the defendants likewise sent a communication to the claimant inviting it to do work at a compensation named.

In the former case the preliminary agreement was followed by a formal contract, the policy of insurance. In this case the preliminary agreement was followed by the formal contract.

In the former case the plaintiff accepted the policy of insurance without examination and raised no objection to it until after the loss of the vessel insured. In this case the claimant accepted the formal contract without examination and raised no objection to it until after the defendants had contracted with the American Imprinting Company.

In both cases it was the defendants who prepared the form of contract, and in each case the matter complained of was the omission of one element of the contract in the preliminary agreement.

If it be true, as stated by Johnson, that the Bureau made no mistake in omitting the provisions from the contract, and that it was not intended to embody them in the agreement, does that fact in law deprive the petitioner of his right of reforming the contract so as to agree with the notice to bidders, which is the advertisement for proposals? The bid of the company was made on the basis of the notice of what would be the conditions and terms of the agreement in case a contract was made. The bid having been accepted, the contract, which was to be reduced to writing, was expected to follow the terms indicated by the advertisement for proposals.

As is said in the Harvey case (671 supra), the written bid in connection with the advertisement and the acceptance of that bid con-
82 stituted the contract between the parties, so far as regards the question whether the contract prices embraced the dam. (Garfield v. United States, 93 U. S. R., 242.)

The restriction of contracts to persons already having contracts, as stated in the advertisement to bidders, must have been intended as an inducement to those persons to bid, and, as is shown by the testimony of the president of the claimant company, and the result of allowing other persons to become competitors, this restriction was a very material consideration in the minds of the bidders having subsisting contracts. The effect of the restriction was to increase the volume of the business and thereby enhance the profits arising from the performance of the work in the fulfillment of contracts. One of the items of damages is for loss on a press provided in contemplation of the extent of the work.

It may be said that a part of the consideration which induced the making of the contract on the part of the claimant was the restriction to bidders having subsisting contracts. The provision of restriction established a condition the effect of which was to increase the profits of the company and thereby became a material part of the contract. The payment of 80 cents per thousand was the compensation which was to be received by the company, but it did not constitute the only consideration or inducement operating on the minds of those intrusted with the business of the company.

It is said, in substance, by the chief clerk, we intended, at the time the letter of April 25, 1899, was written, to restrict contracts to those who had them on that date, and our intention was not to receive contracts after 12 o'clock.

In violation of the restriction of the 25th of April the defendants did let contracts in effect to persons who under former contracts had been the customers of the claimant company, and thereby a part of the consideration which operated as an inducement to the making of the contract failed to the prejudice and damage of the claimant.

It is contended that the provision as to limitation of bidders is against public policy, and therefore it would have been inoperative if inserted in the contract. To that contention it may be replied that the printing of the stamps did not cost the United States anything, and therefore it was a policy which might be adopted by the Department without any violation of the rights and interests of the United States, the maximum price being fixed so as to protect the just rights of those who might be compelled to use the stamps.

The damages in this case are neither conjectural nor uncertain. The claimant has shown specifically what losses there were in consequence of the existence of the American Imprinting Company. They have shown that they lost these customers because of that contract. They have shown specifically the amount of custom which these customers carried to the American Company. The only rebutting evidence which the defendants could have offered to this was that some of these customers would have withdrawn their patronage if the American Company had not existed. There has been no attempt to prove that fact, but, on the contrary, customers have testified substantially that they would not have withdrawn

their business. The only remaining question is, What would have been the claimant's profit on the business withdrawn? And on that question the evidence is much more complete and satisfactory than in ordinary cases where a contractor is seeking to recover his gains prevented.

83 The contract when written should have been in substance the terms contained in the advertisement, and any substantial deviation from those terms by the mistake of the parties may be corrected in this court if such mistake is established by the evidence. The proof shows that the company, through its president, made a mistake in assuming that the restriction was in the contract and, as we have already said, was guilty of no material negligence in not reading the agreement before it was executed. The agents of the United States made a mistake when they omitted the restriction from the agreement, whether it was intentional or accidental; therefore both parties have made a mistake in violation of the rights of the company.

The court having acquired jurisdiction to correct the mistake is authorized by law to take complete jurisdiction of the subject-matter of the contract in order that the controversy may be fully and finally settled. The evidence shows that in consequence of the diversion of the trade of its former customers the claimant was damaged to the extent of the profits which it would have made on the work so diverted, which amounts to the sum of $21,084.99.

It is therefore adjudged and decreed that the contract be re-formed according to the decree herein entered, and that the claimant recover from the defendants as shown in said decree.

84 IX.—*Decree of the court.—Entered Dec. 19, 1904.*

This case being argued and submitted on the 7th day of November, 1904, the court, upon the evidence and the question of law involved, hereby adjudges and decrees that the contract, dated on the 29th of June, 1904, be so re-formed as to embrace the substance of the clause in Exhibit A of the petition filed herein, which is in the words following to wit:

"No application for contract to imprint stamps for period named will be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government,"

and that the same be, and is, considered by the court as forming a part of Exhibit B (the contract) in the determination of the question of the claimant's right to recover; and upon a full consideration of the case, with such re-formation,

It is hereby adjudged and decreed that the claimant recover from the defendants the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99), its damages for the violation of said contract so re-formed.

BY THE COURT.

85 X.—*Application for and allowance of appeal.*

Term 1904–5.

THE MILLIKEN IMPRINTING COMPANY
vs
THE UNITED STATES. } No. 24574.

From the judgment rendered in the above-entitled cause on the 19th day of December, 1904, in favor of claimant, the defendants, by their Attorney-General, on the 3rd day of January, 1905, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed January 3, 1905.

March 20, 1905. On motion of Mr. Assistant Attorney-General Pradt, who presented the application for an appeal herein on behalf of the defendants filed January 3, 1905, it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

86 Court of Claims.

THE MILLIKEN IMPRINTING COMPANY
vs.
THE UNITED STATES. } No. 24574. In equity.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the evidence filed in said cause, of the opinion of the court, of the decree of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

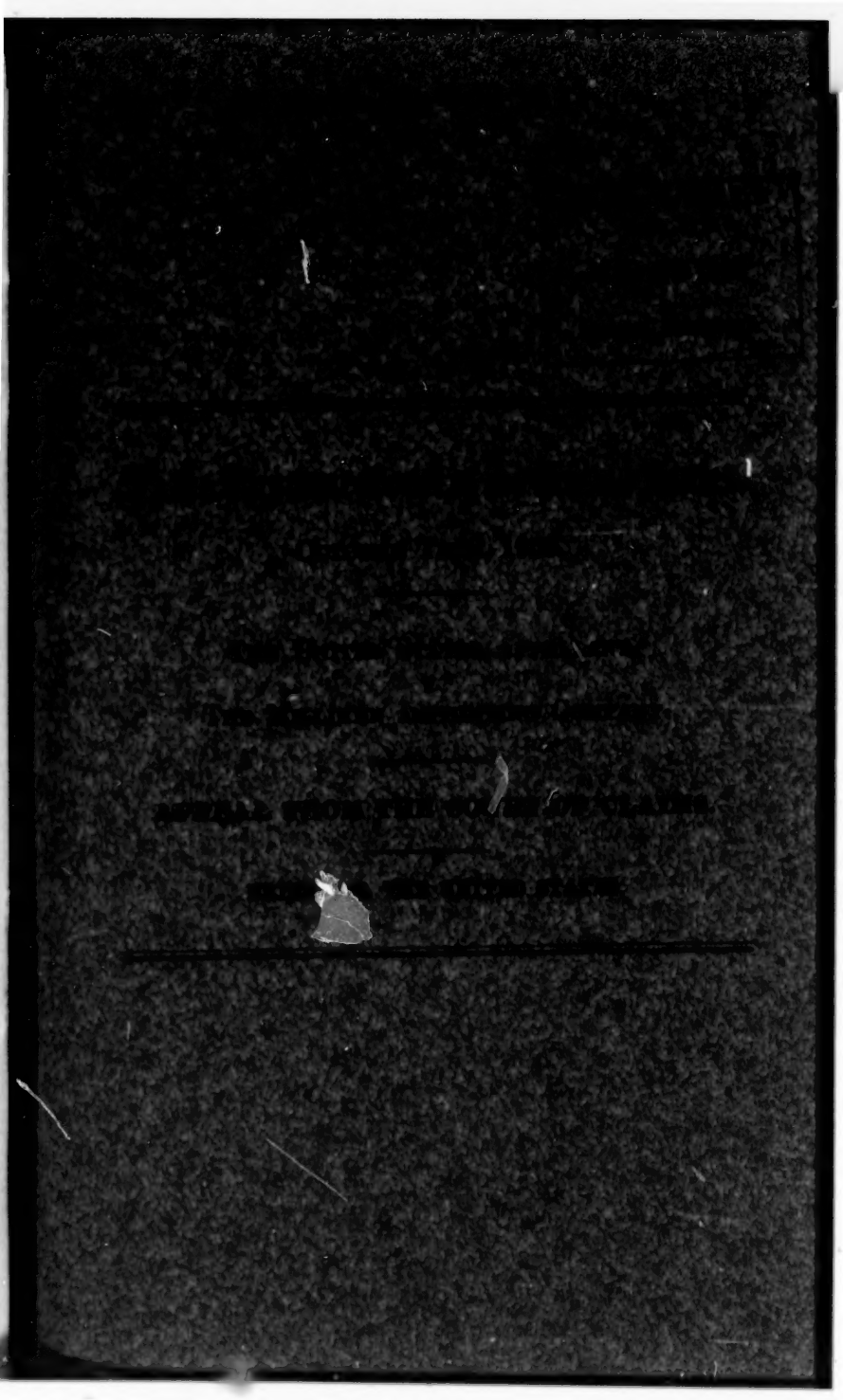
In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims, this 10th day of April, 1905.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 19709. Court of Claims. Term No. 227. The United States, appellant, vs. The Milliken Imprinting Company. Filed April 13th, 1905. File No. 19709.

O



In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE MILLIKEN IMPRINTING COMPANY. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The claimant alleged in its original petition that, pursuant to the act of March 3, 1899, which authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to let contracts for the imprinting of revenue stamps, said contracts to be awarded under such terms, restrictions and regulations as might be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, prescribed certain terms, restrictions and regulations which were to be included

in and made a part of said contract, which were more fully set forth and contained in a preliminary contract entered into by and between claimant and the United States. This alleged preliminary contract was made Exhibit A of the petition and appears on page 3 of the record.

This allegation was afterwards amended by adding thereto the statement that the claimant accepted in writing the "terms, restrictions, and regulations" contained in said Exhibit A, in a letter which was made Exhibit D of the petition and is found on pages 8 and 9 of the record; that at the date of said alleged preliminary contract it was engaged in imprinting revenue stamps under contract with the United States, and that on the 25th day of May, 1899, a contract was awarded to the claimant by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, for the imprinting of stamps. The contract was set forth in full in Exhibit B of the petition and appears on pages 3–6 of the record.

This allegation was afterwards amended by adding thereto that this contract was subsequently executed for a valuable consideration and accepted by the claimant without examination or reading, upon the assurance by a representative of the United States that it contained all the provisions of the alleged preliminary contract (Rec., p. 7).

That by accident and mistake mutual to both parties thereto, and admitted, the said contract did not conform to the terms of their agreement, nor

the intentions of the parties, in that it omitted to state that "no application for contract to imprint stamps for period named will be considered of any person, firm, or corporation not engaged in imprinting stamps on the 25th day of April, 1899, under contract with the Government."

And further that it omitted to state that applications for said contracts shall not be received by the Commissioner of Internal Revenue after 12 m. on the 25th day of May, 1899.

That several weeks after the said 25th day of May, and in violation of said contract, the United States received from and granted an application for a similar contract to the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the United States on the 25th day of April, 1899.

That the said American Imprinting Company became composed of persons engaged in the stationery business, and who required the imprinting of a very large number of stamps on bank checks, etc. That on May 25, 1899, and for a long period prior thereto, the larger number of those constituting the said American Imprinting Company had required this aforesaid business to be done by the claimant, with which they were in every way satisfied, and which they would have continued had it not been for the contract granted to them as aforesaid by the United States, in violation of its contract with the claimant, to the damage of the claimant, as set forth in its amended petition, $21,084.99.

Upon these allegations in its petition the claimant prayed judgment against the United States: "That said contract be reformed so as to express the actual agreement and intentions of the parties thereto, by adding and making a part thereof the following words: 'And it is further agreed by and between the parties hereto that the party of the first part shall not receive, consider, or grant, and has not received, considered, or granted any application for similar contract to imprint stamps as hereinbefore described and provided from any person, firm, or corporation which is not actually engaged in imprinting stamps under contract with the party of the first part on the 25th day of April, 1899.'"

Following this was the prayer for judgment as follows:

> And your petitioner further prays judgment against the United States in the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99) damages for breach of said contract as reformed, and for such other and further relief as it may be entitled to. (Amended petition, Rec., p. 8.)

THE EVIDENCE.

As the Court of Claims assumed equity jurisdiction in the case it made no findings of fact, and accordingly the following synopsis of the evidence as it appears in the record, is presented:

EVIDENCE FOR CLAIMANT.

David Milliken, who is also claimant's counsel, testified that his occupation is attorney at law, his place

of residence city of New York, and that he is president of the claimant corporation; and further as follows:

Claimant performed the work of printing revenue stamps on bank checks for the United States under contract for a period of one year expiring July 1, 1899. During the continuance of that contract there was considerable dissatisfaction on the part of the users of stamps and the contractors, growing out of a lack of uniformity of price to be charged by the contractors for the work done. After the claimant had received the letter of the Commissioner of Internal Revenue dated April 25, 1899 (Exhibit A of petition), on or about the 25th day of May, 1899, he had an interview with the Commissioner of Internal Revenue at Washington, in which he delivered the acceptance of the contract, which is Exhibit D of the petition. At this interview the Commissioner asked him if he was going to make application for renewal of his contract, and he answered yes, but not until 12 o'clock, the time for closing; that he did not want to take the chance of any applications being put in by persons who did not have a contract on the 25th day of April, 1899.

This statement of what was said by the Commissioner was objected to on behalf of counsel for the United States as inadmissible and incompetent, on the ground that said Commissioner was now deceased.

Witness continued that he was then informed by the Commissioner that his application was accepted and his contract would be renewed; that he then called upon Mr. Johnson, chief of the stamp division, and informed him that his contract had been renewed.

Mr. Johnson then delivered to him two copies in blank of the contract to be executed; whereupon he said, "I presume the only changes from the other contract are those contained in the letter or communication dated April 25, 1899?" And Mr. Johnson said, "That is all." He then took the contracts away to New York, and afterwards executed them without reading them and returned them to the Commissioner of Interal Revenue. Very shortly after this, and before the 1st day of July, 1899, he was informed that a contract to do the same work had been granted to the American Imprinting Company.

Knowing that this company had no contract to print stamps on the 25th day of April, 1899, and had not made an application for a contract prior to noon on the 25th day of May, 1899, he looked up his contract, and then for the first time discovered that it failed to state that no application would be received from any person who did not have a contract on the 25th day of April, 1899, and did not state that no application would be received after 12 o'clock on the 25th day of May, 1899. He at once went to Washington and had an interview with Mr. Gage, Secretary of the Treasury. He mentioned to Mr. Gage that the contract to the American Imprinting Company was in violation of the agreement with him, and showed to him at that time the communication dated April 25, 1899. Mr. Gage then admitted that that was the agreement, and stated that the contract to the American Imprinting Company had been granted through inadvertence. Mr. Gage evaded the request to revoke that contract, for

the reason that the Commissioner of Internal Revenue was absent from the city, but stated that should it be violated in any way he would revoke it at once.

This testimony of statements made by Secretary Gage was taken under and subject to the objection that the same was incompetent and inadmissible.

The witness continued that subsequently, upon his own investigation, the Secretary of the Treasury revoked the contract with the American Imprinting Company, but this revocation was afterwards rescinded and they were permitted to continue their work.

The American Imprinting Company was composed entirely of persons, firms, or corporations who were having their stamps imprinted by the claimant to the satisfaction of the said firms.

Afterwards and frequently he had interviews with the Secretary of the Treasury, who at all times freely and frankly admitted that the contract with the American Imprinting Company was in violation of the contract made with the claimant.

This last statement was objected to on the grounds that it was incompetent and inadmissible.

Witness continued that he had had several interviews with Mr. Johnson, who told him that he was familiar with the formulation of the terms and conditions contained in the letter of April 25, 1899; that it was the intention of the United States to make the contracts in such a way that the contractors could make a profit out of the work; that they decided to fix a uniform price of eighty cents a thousand, so that

all persons using the stamps could derive the same benefit from them, or, in other words, to prevent advantage being given to one person over another, and with this in view it had been decided to restrict the contracts to those who had them and not to receive applications after the 25th day of May, 1899. During the operation of the claimant's contract it made a net profit in its business of about $4,000, and could have performed the amount of work that it claimed to have lost by the wrongful act of the defendant with only the added expense of incidental expenditures.

On cross-examination he testified that the contract of the claimant referred to by him was on a printed blank; that the prior contract referred to by him was not the contract of the claimant corporation, but the contract of David Milliken, jr., & Co., of New York, a partnership composed of himself and two others. In this prior contract the provision for salaries of the agent and counter was $2,500 per annum, instead of $3,400, as provided for in the contract of the claimant, and there was also a different provision as to the compensation in the two contracts. These proposed changes he had known of from the letter of the Commissioner of Internal Revenue of April 25, 1899. These changes as to the compensation for imprinting stamps and as to the increase of the salaries of the Government agents were matters in which he felt a pecuniary interest. When he wrote his letter of acceptance of the Commissioner he signed it David Milliken, jr., & Co., that being the partnership then under contract

with the Government, but the contract, nevertheless, was not made by this partnership, but by the Milliken Imprinting Company, a corporation, which corporation had not been a prior contractor.

Thereupon followed these questions and answers:

Cross-question. In this letter of application or acceptance that I have just referred to, signed by David Milliken, jr., & Co., to the Commissioner of Internal Revenue, dated May 25, 1899, attention was called particularly to the salaries to be paid and the compensation to be received for the imprinting. No reference was made in that communication, by specific mention, to the statements made in the Commissioner's letter regarding the time for receiving applications, nor to the fact that such communication recited that "no application for contract to imprint stamps for period named would be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government." That is so, is it not?

Answer. That is so. It speaks for itself.

Cross-question. And is that so because you did not consider it necessary to refer to that?

Answer. I did not consider it relating directly to the subject-matter of the contract. I considered it in my mind in making the application.

Cross-question. I did not ask that.

Answer. I had considered it.

Cross-question. My question relates to the omission to refer to those matters in your letter.

Answer. Yes; it speaks for itself.

Cross-question. And you say, as I understand you, "I did not consider it relating directly to the subject-matter of the contract?"

Answer. Yes.

He received the contract in duplicate, but did not at the time look to see whether it contained the new provisions as to compensation, nor the new provision for $900 more salary to the Government agents. He did not read the contract at all. The reason for this was that he had been assured by Mr. Johnson that the contract contained these changed provisions, and this although Mr. Johnson might be mistaken about that. When he signed the contract he signed it for the Milliken Imprinting Company, of which he was one of the members, and at the time he knew nothing about the new contract except what Mr. Johnson had told him. It might have been a contract for only one cent a thousand, or that the company was to pay $50,000 to the Government, for all that he knew, and he did not, even in the interests of his associates in the corporation, take the pains to ascertain whether Johnson was correct in his understanding of the contract or not. The Milliken Imprinting Company made three or four thousand dollars on their contract. The David Milliken Company on the preceding contract lost considerable money because, under the first contract, there was a cutting in prices which amounted to cut-throat business. The Milliken Imprinting Company was identical as to the persons who composed

it with the partnership of David Milliken, jr., & Co. Mr. Johnson, in his conversation regarding the provisions of the second contract, made no specific reference to anything. (Rec., pp. 42–50.)

On being recalled on behalf of the claimant, Mr. Milliken said:

> I desire to correct my testimony on page 12, where it appears that it was after I received the contract in duplicate that I did not consider that the omitted provisions related directly to the subject-matter of the contract. What I meant was that it was at the time I made application for the contract. In my letter of acceptance, as it appears, it was made in accordance with a circular letter of April 25, 1899, and the matters specifically mentioned by me were only those which I claim I was obligated to do. (Rec., pp. 9–10.)

There was only one competitor of the claimant in the city of New York, which was the Franklin Lee Bank Note Company.

The claimant's plant consisted of four large double presses, one small press, and one pony press. During the entire year, from July 1, 1899, to July 1, 1900, two of the larger presses were idle all the time, and one of the small ones was only occasionally in use. To have done the amount of business which claimant claims it lost by reason of the contract to the American Imprinting Company would have involved the additional expense of $2,285.

The total amount of business which the claimant claims was lost to it by reason of the contract to the

American Imprinting Company was 28,537,509 stamps which, at 80 cents per thousand, the contract price, made claimant's loss in money $22,869.99, from which is to be deducted the sum of $2,285, which would have been the expense of doing that additional amount of work, leaving the sum of $20,584.99 as the amount of claimant's damages from loss of business.

In addition, claimant provided an additional press to meet the requirements of increase of business, at a cost of $700, which became useless and was disposed of for $200, thus making the total damages claimed by claimant $21,084.99, after allowing all just credits and offsets.

The contract entered into by the claimant with the defendant was with the approval of the Secretary of the Treasury, and the restrictions of the contract to those who had them and the limitation of time within which application should be made, constituted the principal inducement to the claimant to make its contract.

Then follows: "I desire to correct my testimony on page 12, where I say I did not make reference in my letter of acceptance to the restriction of the contracts because I did not consider it related directly to the subject-matter of the contract. That I did not mean, for I always considered the restriction as bearing so directly upon the contract that I would not have made it without it. My conduct has always been consistent upon that point, and from the first knowledge of the defendants' disregard of it, and ever since,

I have claimed it to be a violation of the contract. * * * What I mean is that the time when I considered that the restrictions did not relate to the subject-matter of the contract was when I made the application for the contract, and not when I received the contract in duplicate." The object in making the increase in the salaries of the Government agents, as he understood it, was to deter many from seeking a new contract. That is, the Government, as you understand it, "thought that the practical result of requiring the proposed new contractors to pay for an additional counter, would result in deterring many from asking a new contract." (Rec., pp. 11-14.)

DEPOSITION OF JOHN H. STEWART.

I am a member of the firm of Stewart, Warren & Co., manufacturing stationers in New York City. We formerly employed the firm of David Milliken, jr., & Co., to imprint revenue stamps on the checks which we furnished our customers. This work they performed satisfactorily up to July, 1899. Our firm became a member of the American Imprinting Company, and was one of the organizers of it, and thereafter we had our stamps imprinted by the latter company. If it had not been for our contract with the American Imprinting Company we would have continued to send our work to the Milliken Imprinting Company. The total number of stamps imprinted by us during the year July 1, 1899, to July 1, 1900, was 9,278,207. When we sent our work to Milliken & Co. it was because we were dissatisfied with the work

done by the Franklin Lee Bank Note Company. The object of the American Imprinting Company was to do work for the members of that company and any one else who chose to give their work to the company.

Cross-examination. The imprinting of stamps in the course of our business by the American Imprinting Company cost us less than if we had had the same work done by the Milliken Imprinting Company, because we shared in the profits of the business of the American Imprinting Company. Each one of the stockholders of the American Imprinting Company of course transferred to the company all of their business, and it was to the interest of all of us to get customers for the American Imprinting Company. During the same year we had 21,202 stamps printed by the Milliken Imprinting Company for customers who directed that it be done by that company. The amount that we paid for the printing of our stamps by the American Imprinting Company was 80 cents per thousand, the uniform rate fixed by the Government. (Rec., pp. 14–19.)

DEPOSITION OF HERSEY BROWN.

I am a member of the firm of Brown, Lent & Pett, manufacturing stationers, of New York City. Our work of imprinting revenue stamps was done prior to July 1, 1899, by David Milliken, jr., & Co.—that is, the largest part of it. We sent some during that time to the Franklin Lee Company. After we had begun business with David Milliken, jr., & Co., we sent it all

to them and were entirely satisfied with their work. After the formation of the American Imprinting Company, of which our firm was a member, we had our imprinting done by that firm, because we shared in the profits of imprinting the stamps. It would be impossible to tell exactly whether if it had not been for our contract with the American Imprinting Company we would have continued to send our work to the Milliken Imprinting Company, but the conditions being the same as they had been the year before we would have been likely to do so. The American Imprinting Company imprinted for us 2,721,859 stamps.

Cross-examination. We paid the American Imprinting Company the regular price for imprinting stamps, but got dividends from that company out of the profits. It was to the interest of our firm to increase the business of the American Imprinting Company. We got our customers from banks all over the country, and the more we increased the business of the American Imprinting Company the more money we would make. This was not the case during our arrangement with David Milliken, jr., & Co. (Rec., pp. 20–22.)

DEPOSITION OF WILLIAM E. BADEAU.

I am the manager for J. H. Warner, manufacturing stationer, of New York. Our imprinting of revenue stamps was done prior to July 1, 1899, by David Milliken, jr., & Co. It was done satisfactorily. We transferred this business on the organization of the

American Imprinting Company to that company, because we were one of the stockholders of the American Imprinting Company. If it had not been for our contract with the American Imprinting Company we would have continued to send our business to the Milliken Imprinting Company, if the work had continued to be satisfactory. The American Imprinting Company printed 3,663,093 stamps for us.

Cross-examination. I was a stockholder of the American Imprinting Company for the benefit of our firm, for the purpose of securing benefits from it. There was profit in the business in the way of dividends on the stock, and it was therefore to our advantage to increase the business of the American Imprinting Company. In other words, we paid the regular price for printing stamps to the American Imprinting Company and received some of it back in profits. We could have had as good work done by the Franklin Lee Bank Note Company at the time that we were dealing with the Milliken Imprinting Company, but we preferred the latter company because the Franklin Lee Bank Note Company was a rival of ours in the stationery business. (Rec., pp. 23–28.)

DEPOSITION OF RALPH BALMER.

I am the manager of the corporation, Styles & Cash, manufacturing stationers, of New York City. Prior to July 1, 1899, for the first four months our imprinting of stamps was done by the Franklin Lee Bank Note Company. After that it was done by

David Milliken, jr., & Co., in a satisfactory way. After July 1, 1899, the American Imprinting Company did our printing of stamps. If we had not had it done by them we would have continued to have it done by the Milliken Imprinting Company. The American Imprinting Company printed for us 2,219,350 stamps from July 1, 1899, to July 1, 1900. Both Styles and Cash were stockholders in the American Imprinting Company and it was to their advantage to increase the business of the American Imprinting Company. I do not know why we left the Franklin Lee Bank Note Company to go to the David Milliken, jr., & Co. The character of the work done by each of those companies was satisfactory, except that the Franklin Lee Bank Note Company were slow. And this was one of the reasons that I gave to the firm for changing to the Milliken Imprinting Company, but ultimately why it was changed I can not say, because I did not change it myself. (Rec., pp. 28–31.)

DEPOSITION OF CHARLES H. MANN.

I am president of the William Mann Company, stationesr, etc. Prior to July 1, 1899, our imprinting of stamps was done by the Franklin Lee Bank Note Company. When the American Imprinting Company was formed I was a stockholder and subsequently became its president. It was composed strictly of New York, Philadelphia, and Baltimore stationers and printers. After it was formed we gave them almost all our work after the 1st of July. If it had not been for our contract with the Amer-

ican Imprinting Company we would have sent all our work, with the exception of a very little of it which we did in Philadelphia, to the Milliken Imprinting Company, and would not have continued our work with the Franklin Lee Bank Note Company because they were competitors in our line of business. The amount of stamps done by the American Imprinting Company was in the neighborhood of 5,700,000 in Philadelphia and 12,000 to 13,000 in New York.

Cross-examination. It was to my advantage to have the William Mann Company do as much as possible with the American Imprinting Company because I shared in the profits of the latter company. We never did any business with the Milliken Imprinting Company, except that our New York branch had work done by the Milliken Imprinting Company after the American Imprinting Company was formed. This was through instructions from our customers; otherwise it would have gone into the American Imprinting Company. The William Mann Company had a great many customers, and except where specially otherwise directed I placed their printing business with the American Imprinting Company, unless we had instructions to the contrary, and with the exception of stamps imprinted for us by the Pennsylvania Publishing Company in Philadelphia, which we gave them to keep them in good humor. I look upon the Franklin Lee Bank Note Company as our competitors and I also ascertained that they had various prices for imprinting revenue stamps. This was prior to July 1, 1899. Our business of imprinting

stamps was much larger the second year than the first year. (Rec., pp. 31–38.)

DEPOSITION OF SAMUEL WILLIAMS.

I am president of the Milton C. Johnson Company, manufacturing stationers of New York City. Prior to July 1, 1899, the Milliken Imprinting Company did the most of our imprinting of stamps. After July 28, 1898, they did it all until the organization of the American Imprinting Company and did it satisfactorily, except that there were occasional delays in deliveries, but not serious delays. We were stockholders in the American Imprinting Company, and transferred our business of imprinting stamps to that company, deriving a profit from its business. If it had not been for the organization of the American Imprinting Company I presume that we would have continued to send our work of imprinting stamps to the Milliken Imprinting Company. The amount of business done by the American Imprinting Company for us was at least 5,000,000 stamps.

Cross-examination. I was a director in the American Imprinting Company and it was to our advantage to increase the business of the American Imprinting Company. There were some objections made to the work of the David Milliken, jr., & Co. on account of delays and perhaps some other objections, but practically the work was perfectly satisfactory. The directors of the American Imprinting Company went into the business to some extent of getting out-

side parties to send them their work. The Franklin Lee Bank Note Company performed work satisfactory for us, except that it was not always turned out promptly. (Rec., pp. 38–42.)

EVIDENCE FOR DEFENDANTS.

ELLIS C. JOHNSON.

I am chief of the stamp division, Internal-Revenue Bureau, Treasury Department. Have held this position about seven years. I held it at the time that the contract of June 19, 1899, referred to in claimant's petition, was executed, and am perfectly familiar with the contents of that contract. I prepared the original contracts in 1898. Consequently when we were desirous of reducing the number of contractors, in making the matter of imprinting internal-revenue stamps uniform throughout the United States, by the contractors, the changes in the contract were made. It was just prior to July 1, 1899, when the contracts were printed. Then the contracts were filled up by the Commissioner, omitting the signatures, and forwarded to the several parties who had signified their willingness to sign the contracts for the next year.

The printed text of the former contracts was practically preserved, except in so far as it differed from the new provisions which had been agreed upon in the Commissioner's office as to compensation for imprinting and the salaries to be paid by the contractors. There were about twenty-five or thirty new contracts made and the blanks were

prepared precisely alike for all these new contracts. After they had been prepared they were presented to the attention of the Commissioner of Internal Revenue, who signed them afterwards. I do not know whether or not he read them, but I think he did. I went over the matter with him and conferred about the terms and conditions, as I did about official business of that importance at all times.

In preparing these contracts no reference was made in any way to the fact stated in the circular letter to the contractors, of April 25, 1899, of the Commissioner of Internal Revenue, that applications would not be received except from present contractors, nor was any reference made to the statement therein contained that each application mu t be accompanied with a guarantee of at least two responsible persons, and that in case the contract was entered into an acceptable bond must be furnished in the sum of $25,000 for the faithful performance thereof, nor was any reference made to the statement therein contained that applications would be received at the office of the Commissioner of Internal Revenue until 12 m. May 25, 1899. These matters were not omitted from that contract by mistake on my part. So far as I know there was no intention on the part of the Bureau of Internal Revenue or of the Treasury Department to include any of those provisions in these contracts.

I remember several conversations with Mr. Milliken about contracts and the method of doing the business, but I have no distinct recollection of the

specific matter alleged being discussed in the conversation Mr. Milliken has referred to. I made no statement in regard to the contents of this second contract by which I intended to have him rely upon that statement as to such contents solely. I at no time made any statement to him in regard to the contents of this intended contract which I intended he should rely on to the exclusion of his finding out himself what was in the contract. If he is correct in his recollection that he asked me if the contract contained the changes referred to in the circular letter and I stated that it did and that was the only change, I had no intention of assuring him that the contract contained statements as to the date when applications would be received and that contracts would be let only to present contractors. As a matter of fact, it did not contain any such statements.

Cross-examination. The Commissioner of Internal Revenue and myself agreed to the changes in these contracts. I had several conversations with the Commissioner prior to the issuing of the communication dated April 25. It was our intention when the letter was written to restrict the contracts to those who had them on that date and not to receive applications after 12 o'clock on the 25th day of May, and the purpose of the letter was that those who had existing contracts were the only ones who should have a renewal of their contracts.

Cross-question. Now, at the interview that I mentioned that I had with you regarding the contents of the contract, there was no intention on my part

to mean or say that you misled me in any way at all, but the question put by Mr. Pradt rather assumed that. Do you recall any conversation that I had with you about that time, on the 25th day of May, after my contract had been awarded to me; or let me put it this way: Do you recall any conversation, as I have related, in which I stated or I had asked you if the new contracts contained anything but the changes provided for or mentioned in the letter of April 25? Do you recall any such conversation as that?

Answer. I recollect a number of conversations you had with me at different times affecting this contract and this work, but I don't recollect any conversation in which the language used by you or the answer assumed by me was made or given.

Cross-question. Are you prepared to state that no such conversation may not have been had?

Answer. I am not.

After I drew up the blank form of contract I presented it to the Commissioner of Internal Revenue before execution. I do not recall whether he actually read the contract. I was impressed with the idea that he did. He was a careful man and usually in matters of that kind would run over matters with me or by his comparing it or reading it himself. He left the drafting of the contract to me. The American Imprinting Company was not printing stamps under contract with the Government on the 25th day of April, 1899.

Redirect examination. At the time of the conversation that I had with Mr. Milliken, that he has referred to, I was not authorized in any way by virtue of the duties of my official position to make statements to intending contractors as to what the contract they were going to sign contained, for the purpose of having them rely solely upon what my understanding of the contents of those contracts was. I had no intention of assuming to do anything of that sort. It was the custom of the Commissioner to read over important papers which he had to sign. The number of these new contracts was about 25, and the blanks were all alike. All that was necessary was to read one only in order to know the provisions that they would all have. The business was a very important business. It was considered in the office an important matter to have this compensation for imprinting made uniform throughout the United States, and the contracts provided for that, which the old ones did not. It was considered a matter of some importance to have the salaries to be paid by the contractors to the Government employees increased. It gave additional supervision. Those matters had been discussed in the office of the Commissioner of Internal Revenue, by the Commissioner, among others, prior to issuing that letter of April 25, and I submitted to him the contract containing these two new and important provisions.

Recross-examination. The object of restricting the new contracts to those that had them on the 25th

day of April was to prevent the increase in the number of contracts as much as anything else. There might have been some other purpose. It was to prevent discrimination among those who were imprinting stamps and make the instrument upon which they were imprinted and concealing the price of that in the manufacture of the instrument itself. In other words, it was done for the purpose of preventing the constant annoyance and criticism that the office and Department were subjected to on account of the manner in which some of the contractors were doing business. To overcome that it was determined to fix the price and compel them to adhere to it, in the interest of good service and the prevention of any cause of criticism by the taxpayers throughout the country. The additional counter was added to each contract primarily to increase the expense so that the business would be reduced within legitimate bounds. On the other hand, it was urged that some large imprinting establishments had not sufficient supervision by one counter and it was to assist them along. I think it had been considered by all as important. It was done for the purpose of reducing the number of contracts. (Rec., pp. 50–56.)

THE FACTS.

The following is deemed to be a fair summary of the material facts in this case as shown by the record:

The claimant entered into a contract with the Commissioner of Internal Revenue to imprint internal-revenue stamps for the year beginning July 1,

1899. During the previous year a partnership, composed of the stockholders of the claimant corporation, had a contract for imprinting such stamps. On the 25th day of April, 1899, the Commissioner of Internal Revenue issued a circular letter to the various contractors for imprinting internal-revenue stamps, informing them that changes would be made in the new contracts in the matter of prices and cost of supervision; that applications for new contracts would not be considered from any person, firm, or corporation not then engaged in imprinting stamps under contract with the Government; that each application for a contract must be accompanied by a guaranty that in case a contract was entered into a bond would be furnished for the faithful performance thereof; that the Commissioner reserved the right to reject any and all applications and cancel any contract wherever and whenever it should appear to the interests of the public and the Government to do so; that applications would be received at his office until noon, May 25, 1899. Subsequently blanks were prepared for the new contracts, after careful consideration in the office of the Commissioner of Internal Revenue by that officer, and contained the new provisions as to the amount to be paid by contractors for expenses of supervision and as to compensation for imprinting, the latter change being made, as stated in said circular letter, to secure absolute uniformity in prices charged, while the first change, it was thought, would tend to reduce the number of new contracts.

On the 25th of May, 1899, the firm of David Milliken, jr., & Co., made written application to the Commissioner of Internal Revenue for a contract for imprinting stamps, in accordance with his circular of April 25, 1899, specifying in said application the new provisions set forth in said circular as to salaries for supervision and as to compensation for the work. This application was granted by the Commissioner of Internal Revenue, but the contract was executed by the claimant corporation instead of the partnership firm, and as so executed was accepted and entered into by said Commissioner. The contract was signed by the Commissioner with full and careful knowledge of its contents and of the changes made in the same from the old contract, which changes were all that had been intended or contemplated by him. But the president of the claimant, who represented the claimant in the matter, signed the contract on behalf of the claimant without reading it, and with no other knowledge of its contents than such as he had gathered from a conversation with Mr. E. C. Johnson, the chief of the stamp division in the office of the Commissioner of Internal Revenue, from which conversation he drew the conclusion that the contract contained not only the changes which he had specifically mentioned in his application for David Milliken, jr., & Co., but also provisions that no contracts for imprinting stamps during that year would be made with others than those holding contracts during the prior year, and that applications for contracts would be received

by the Commissioner only until noon of May 25, 1899. The official with whom he had this conversation had no intention of making any statement regarding the contract upon which the representative of the claimant should rely, and was not authorized to make any such statement; nor was there any warrant upon the part of the representative of the claimant for assuming that that official had any such authority. That official was not a party to the contract. Furthermore, he did not have in mind at the time any reference to the particular matters which the representative of the claimant says were in his mind, but solely to the changes which had actually been made in the new contract, the draft of which new contract had been prepared by him at the request of the Commissioner. This representative of the claimant, however, now states that he understood from the letter of the Commissioner of April 25, 1899, and from his said conversation with Mr. Johnson, that it was intended that the new contract for the year 1900 should contain a provision that no contracts for imprinting revenue stamps would be made with any party not already holding a contract for such imprinting and that no application for any such contract would be received after May 25, 1899; and that he discovered that it did not contain those provisions upon reading it for the first time after a similar contract had been made by the Commissioner with the American Imprinting Company. The claimant made a profit on its business of about $4,000, whereas under the contract for the preceding year the firm of

David Milliken, jr., & Co. operated at a loss. This result was brought about largely through the uniformity in prices for imprinting stamps provided for in the new contract. But the claimant contends that its profit would have been much larger had it not been for the fact that the Commissioner of Internal Revenue, subsequent to the execution of its contract, entered into a similar contract with the American Imprinting Company, another corporation in New York City, which corporation was composed largely of its former customers, and performed the work of imprinting stamps which otherwise it contends would probably very largely have been given to the claimant.

CLAIMANT'S PETITION.

Upon this state of facts the claimant prayed the Court of Claims to re-form its contract with the Commissioner by adding to the same the provisions omitted, as it alleged, by mutual mistake, and to give it judgment because of alleged breach by the United States of the contract as so re-formed, through entering into the contract with the American Imprinting Company, in the amount of the profits which it claimed to have lost thereby.

The Court of Claims granted the prayer for reformation of the contract and entered a decree to that effect as follows:

> The Court, upon the evidence and the question of law involved, hereby adjudges and decrees that the contract dated on the 29th

[19th] day of June, 1904, be so re-formed as to embrace the substance of Exhibit A, of the petition filed herein, which is in the words following, to wit:

"No application for contract to imprint stamps for period named to be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government," and that the same be and is considered by the Court as forming a part of the contract in the determination of the question of claimants' right to recover; and upon a full consideration of the case with such re-formation,

It is hereby adjudged and decreed that the claimant recover from the defendant the sum of $21,084.99, its damages for the violation of said contract so re-formed. (Rec. p. 69.)

ASSIGNMENTS OF ERROR.

The appellant makes the following assignments of error:

First. The court erred in taking jurisdiction of the case and in not dismissing the same for want of jurisdiction.

Second. The court erred in re-forming the contract between the claimant and the United States set forth in Exhibit B of claimant's petition.

Third. The court erred in rendering judgment for the claimant in any amount whatsoever.

ARGUMENT.

EQUITY JURISDICTION OF THE COURT OF CLAIMS.

Under the statutes conferring and defining the jurisdiction of the Court of Claims, the claimant has heretofore been required by the court to present in his petition a claim founded on contract upon which a money judgment only was demanded. This case is a notable and practically the sole exception to this established rule. In this case the claimant asserted no claim arising out of any existing contract and did not in the first instance ask for a money judgment. On the contrary its petition invoked at the outset the exercise by the court of equity jurisdiction only, and the primary judgment prayed by it was a purely equitable decree of re-formation of a contract between it and the United States. And the court was asked to thus sit and act as a court of equity on the ground that by so doing there would be made to appear a claim for money damages arising out of the contract as re-formed by the court, for which a money judgment was secondarily asked.

The Court of Claims exercised the equity jurisdiction thus invoked, basing such action upon the enacting clause of section 1 of the act of March 3, 1887 (24 Stat. L., 505), commonly known as the Tucker Act, it being conceded by the court that, prior to the passage of that act, it was without equity jurisdiction except when given by a special act of Congress. (Rec., p. 61.) This concession is in accordance with the decisions of this court in *Harvey* v. *United States*, 105 U. S., 679, and *Jones* v. *United States*, 131 U. S., 1.

Thus the first question to be decided on this appeal is whether the Tucker Act confers upon the Court of Claims the equity jurisdiction necessary to entertain an action brought for the re-formation of a contract and to enter a decree of such re-formation, because there is joined in such action a demand for a money judgment alleged to arise upon the contract if re-formed as prayed for.

Although the claimant coupled with its prayer for equitable relief a demand for a money judgment, the fact remains that its petition is primarily addressed to the Court of Claims as a court of equity pure and simple.

> A suit in equity is the only known remedy for the re-formation of a written contract. (*Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass., 48; Pomeroy's Eq. Jur., sec. 188.)

When, therefore, the claimant prayed the Court of Claims to re-form its contract with the United States, it sought to enter the court as a court of equity and not as a court of law. Indeed it could enter the court in no other way, for confessedly it had no claim against the United States under its existing contract. In other words, unless the Court of Claims could first sit as a court of equity in the case and render a decree for the purely equitable relief prayed by the claimant, it had no jurisdiction at all of the action, since otherwise, and until such decree should be rendered, the claimant had no claim founded upon contract to assert.

In support of the decision of the Court of Claims on

this question of jurisdiction, reliance is placed upon the cases of *South Boston Iron Works* v. *United States* 34 C. Cl., 200, and *District of Columbia* v. *Elias E. Barnes*, 197 U. S. 146.

In the former case the Court of Claims held, as in this case, that it had equity jurisdiction under the Tucker Act to re-form a contract under circumstances similar to those in this case, but refused to re-form the contract on the evidence. From this decision the claimant did not, and the United States obviously could not, appeal. And as the decision was rendered without any discussion, it is clear that it sheds no light upon the question in this case that is not to be found in the decision here appealed from.

The decision of this court in the Barnes case was based upon the language of a special statute relating to certain claims against the District of Columbia, conferring upon the Court of Claims "original legal and equitable jurisdiction" of such claims, and the opinion of the court, delivered by Mr. Justice Day, in which it is held that the Court of Claims had jurisdiction in that case to re-form a contract, is expressly based upon that special jurisdictional statute. To be sure, reference is made in the same opinion to the decision of the Court of Claims in the South Boston Iron Company case, *supra*, and to the principle of law respecting claims arising out of equitable demands, recognized in this court in the case of the *United States* v. *Jones*, 131 U. S., 1, but nevertheless the decision of the court did not involve nor attempt to

determine the extent of the equity jurisdiction of the Court of Claims conferred by the Tucker Act. Hence, that question is now before this court for determination unless it has already been decided in the negative in the Jones case, above referred to.

In delivering the opinion of this court in that case Mr. Justice Bradley, after citing the case of *United States* v. *Alire*, 73 U. S., 6 Wall., 573, holding that under the jurisdictional acts of 1855 and 1863 the Court of Claims has power only to render judgment for money found due from the Government to the petitioner (p. 16), continues, with reference to the Tucker Act:

> It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go further than this (p. 18).

This would seem to be determinative of the question of jurisdiction here raised. It is true that in this case there is coupled with the prayer for equitable relief a demand for a money judgment, but the claim upon which such money judgment might be entered has no present existence and can arise only through the equitable relief prayed for. Hence the Court of Claims was called upon by the petition and was obliged, to first sit as a court of equity and render a purely equitable decree in the case. But this is

exactly what it has no power to do, according to the Jones case. That is to say, whilst it has jurisdiction of a *claim for a money judgment arising out of the decree of a competent court of equity*, it has no power to *render such decree* in the first instance in order that it may afterwards proceed to consider the claim thus arising. In other words, its jurisdiction of a "claim for money arising out of an equitable demand" (Jones case, p. 18) does not extend to the equitable demand itself. It has power to interpret the dream but not to first tell the dream.

If the view taken by the Court of Claims is correct, then all that is necessary in order that it may sit and act as a court of equity is for a claimant to unite with a petition for equitable relief a demand, however slight, for a money judgment upon the claim to be thus created. So that in the Jones case if there had been asserted a claim for use and occupation by the United States of the land in question, the court would have had power to first decree the issuance of the patents as prayed for.

In brief, the United States contends that the Court of Claims, however able and qualified, is not in any sense a court of equity. Congress has frequently recognized this since the Tucker Act by special acts giving equity jurisdiction to the Court of Claims in a particular case.

THE ALLEGED MISTAKE.

The purpose of an action for reformation of a contract on the ground of mistake is not to interpret the

written contract, but to correct it so that it shall truly state the agreement of the parties. And since in such an action the court is simply called upon to declare the true and complete contract of the parties, which the written contract, through mistake, does not fully set forth, it is clear that the mistake alleged must be mutual. Such is the settled rule of law.

Alabama Midland Ry. Co. v. *Brown*, 98 Ala., p. 648.

Pomeroy's Eq. Jur., sec. 870 and sec. 1376.

> It is enough to authorize the reformation of a contract if it appears that, through the mistake of both parties to it, the intentions of neither have been expressed in it. (*Maher* v. *Hibernian Insurance Co.*, 67 N. Y., 290.)

EVIDENCE REQUIRED.

The evidence of this mutual mistake must be clear and convincing—"the strongest possible."

> Courts of equity do not grant the high remedy of reformation upon a probability nor upon a mere preponderance of evidence, but only upon a certainty of the error.
>
> *Pomeroy's Eq. Jur.*, sec. 850.
>
> *1 Story's Eq. Jur.*, sec. 152.
>
> *Phœnix Fire Ins. Co.* v. *Gurnee*, 1 Paige Chancery Rep., p. 279.
>
> *Newton* v. *Holley*, 6 Wis., 604.

The mistake, indeed, according to the current of authority, must be established beyond reasonable doubt.

Hearne v. *Marine Ins. Co.*, 20 Wall., 490.

Stockbridge Iron Co., supra, 102 Mass., p. 49.

Meade v. *West Chester Fire Ins. Co.*, 64 N. Y., 455.

See also authorities cited in 1 Story's Eq. Jur. (13th ed., 1886), p. 153.

> The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed (except in case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of these cardinal principles in the administration of this peculiar remedy would lead to the assumption of a power which no court possesses, of making an agreement between parties to which they have not both assented.
>
> *Meade et al.* v. *West Chester Fire Insurance Co.*, (64 N. Y., 455.)

ABSOLUTE FAILURE OF PROOF OF MUTUAL MISTAKE.

In the present case, so far from there being any clear and convincing evidence of *mutual* mistake, there is an absolute failure of proof of any mistake whatever on the part of the Commissioner of Internal Revenue. So far as the Commissioner was concerned, the contract contained precisely what he intended it should contain, after deliberate consideration of the matter. The claimant relies upon the circular letter of the Commissioner (Exhibit A of the petition) and the claimant's "acceptance" (Exhibit D) as evi-

dence of the mistake, "*documentary and indisputable.*" The process of reasoning by which this contention is evolved is thus presented: The circular letter of the Commissioner was a complete proposition on the part of the Commissioner respecting the work of imprinting internal-revenue stamps for the Government, addressed only to parties then engaged in such work. This proposition was accepted by the claimant, and thereby a preliminary agreement was entered into between the parties, which constituted the real contract. Subsequently, however, by mutual mistake, portions of the contract thus entered into were omitted from the final written contract thereafter drawn up and executed by the parties.

This contention is without foundation in fact. To begin with, the circular letter of the Commissioner was not a *proposition* at all, but a *notification* to parties contemplating applications for contracts, and the reply of the claimant, or rather of the partnership which afterwards organized the claimant corporation, was not an *acceptance*, but an *application* for a contract. The evidence of Ellis C. Johnson, chief of the stamp division in the Bureau of Internal Revenue, shows that this circular letter of the Commissioner was drawn up and sent to the various parties then engaged in imprinting stamps for the Government as a result of the prior experience of that Office in the matter of the imprinting of revenue stamps for the Government by private parties, in consequence of which the Commissioner had determined to require absolute uniformity in the prices charged

by the various contractors for imprinting stamps and to endeavor to reduce the number of contractors by increasing the cost of supervision from $2,500 to $3,400 per annum; also to restrict the number of contractors to parties then engaged in the same work (Rec., p. 51). These conclusions were made known to the then contractors for imprinting stamps through the circular letter of the Commissioner dated April 25, 1899. The letter began with this paragraph:

> In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps.

Following this was a statement of the additional provisions in the new contracts determined upon, relating to salaries for supervision and to compensation.

These proposed changes were specified in the two paragraphs immediately following the announcement of such changes. The language of these paragraphs is clear and unmistakable, pointing out with definiteness the changes to be made. (Ex. A., Rec., p. 3.)

The letter then went on to notify intending applicants that no application for contract to imprint stamps for the succeeding year would be considered from any party not then engaged in imprinting stamps under contract with the Government; that each application for contract must be accompanied by a guaranty; that in case a contract was entered into and accepted, a bond in the sum of $25,000 would be

required; that the Commissioner reserved the right to reject any or all applications, and to cancel any contract wherever and whenever it should appear to the interests of the public and the Government to do so; and that applications would be received at the office of the Commissioner until noon, May 25, 1899, giving directions as to the manner of formally presenting such applications.

The claimant now insists that it was the intention of this letter to notify applicants for contracts for imprinting stamps that the contracts for the succeeding year would contain the provision that no application for a contract would be considered from any party not then engaged in imprinting stamps under contract with the Government, and that applications for contracts would be received by the Commissioner until noon, May 25, 1899. It is perfectly evident, however, that there was no intention on the part of the Commissioner of adding to the new contracts *all* that was contained in this circular letter after the opening paragraph. Even claimant admits that this is so, as to its recitals regarding the guaranty to be furnished on application for a contract, the amount of the bond, that applications should be sealed, and regarding the manner in which they should be addressed to the Commissioner. Accordingly, it becomes necessary to examine the letter in order to determine what portions of it related to the proposed additional provisions in new contracts. There is no question, as already pointed out, that the two paragraphs following the opening paragraph relate to such

provisions, one of them providing for an increase of $900 in the cost of supervision to be paid the United States, and the other fixing absolutely uniform prices for the imprinting of stamps; but just as clearly no intention on the part of the Commissioner is expressed in this letter of a determination to incorporate into the new contracts a provision by which the United States should be absolutely bound for a year to let such contracts only to persons holding existing contracts, or barring himself from receiving applications after May 25, 1899. In other words, tying his own hands by an agreement fraught with possible mischief and prejudice to the interests of the Government, and, too, without any consideration. He had, to be sure, decided for the time being upon this course as a matter of policy, and gave notice of such conclusion to intending applicants for contracts in his circular, but to say that it was his purpose to enter into a binding contract to rigidly pursue this policy is simply preposterous. Indeed such an improvident agreement would undoubtedly have been void as against public policy—as an unauthorized attempt to bar the Government from the exercise of essential discretionary powers. The exigencies of the Government might, within the ensuing year demand twice as many private contractors as were then engaged in imprinting stamps. The work of the claimant in New York might prove so unsatisfactory as to make it absolutely essential to cancel its contract under the right reserved by the Commissioner so to do, with the resulting necessity of a

new contract with some other party in that city who had never before been engaged in such work. This is all plain common sense, and the claimant, or the claimant s predecessors, so recognized it in their application for a contract, dated May 25, 1899, wherein are specified simply the additional provisions recited in the Commissioner's circular letter relating to salaries and to compensation, but nothing else. (Ex. D., Rec. p. 8.) This matter was called, on cross-examination, to the attention of the president of the claimant, David Milliken, jr., who wrote the application above referred to, as follows:

> 33. Cross-question. In this letter of application or acceptance that I have just referred to, signed by David Milliken, jr., & Co., to the Commissioner of Internal Revenue, dated May 25, 1899, attention was called particularly to the salaries to be paid and the compensation to be received for the imprinting. No reference was made in that communication by specific ment on to the statements made in the Commissioner's letter regarding the time for receiving applications, nor to the fact that such communication recited that "no application for contract to imprint stamps for period named would be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government." That is so, is it not?
>
> Answer. That is so. It speaks for itself.
>
> 34. Cross-question. And is that so because you did not consider it necessary to refer to that?

Answer. I did not consider it relating directly to the subject-matter of the contract. I considered it in my mind n making the application.

35. Cross-question. I did not ask that.

Answer. I had considered it.

36. Cross-question. My question relates to the omission to refer to those matters in your letter.

Answer. Yes; it speaks for itself.

37. Cross-question. And you say, as I understand you, "I did not consider it relating directly to the subject-matter of the contract?"

Answer. Yes. (Rec., pp. 46–47.)

Afterwards, to be sure, in a subsequent deposition, this same witness attempted correction of this testimony (Rec., pp. 9–11), but this correction is so clear y an afterthought that it does not seem to merit serious consideration.

Finally, it is only necessary to read the circular letter of the Commissioner and the reply thereto, which the claimant treats as an acceptance of a proposition, to see that the letter was in no sense a proposit on, but purely a notification, and that it committed the Commissioner :o nothing. On the contrary, intending applicants for contracts were explicitly informed in that letter that the Commissioner reserved the right to reject any and all applications. Indeed, the phrase "application for contract" in the letter alone conclusively disposes of the contention that it was a proposition which required only acceptance to become a contract.

The letter simply gave notice to the parties then engaged in imprinting stamps for the Government of certain additional provisions which the Government would require in such contracts; as to who would be allowed to bid for a contract; when such application should be made, and of the manner in which it must be made; but contained no assurance whatever that when the application was made, even in strict compliance with all these requirements, it would be accepted. It is perfectly apparent from the reply made in behalf of claimant that the situation was understood by the writer of such reply to be exactly as here stated, for instead of being in the nature of a bid or proposal, it is simply an application for a contract, making specific reference to the additional provisions which the Government would require in such contract, but not a word relating to the matters which the claimant now contends should have been incorporated in the contract, and which it now says were of *paramount* importance.

Further and conclusive evidence, if more were needed, of the additional provisions which the Commissioner of Internal Revenue had decided to incorporate into the new contracts for imprinting stamps is to be found in the fact that he caused to be drawn up by Mr. Johnson, chief of the stamp division in his office, the draft of the new contracts which was substantially the same as the old ones with the exception of an increase of $900 in the cost of supervision and a provision fixing uniform prices to be charged by all contractors for imprinting stamps. This was

done after conversation between the Commissioner and Mr. Johnson relative to the provisions of the new contract. (Rec., pp. 51 and 53.) After these blanks were prepared by Mr. Johnson they were submitted to the Commissioner, being about twenty-five in all. As they were identical, it was necessary for him to read but one. (Rec., p. 54.) This was prior to the 1st of July, 1899. Then the contracts were filled up by the Commissioner, omitting signatures, and forwarded to the several parties who had signified their willingness to sign the contracts for the next year. (Rec., p. 51.) Mr. Johnson does not know certainly that the Commissioner read the contracts, but testifies as follows:

> I think he did. I went over the matter with him and conferred about the terms and conditions, as I did about official business of that importance at all times. (Rec., p. 51.)

And on cross-examination:

> Cross-question. Now, Mr. Johnson, you say that after you drew up this contract—that is, the blank form of contract—you presented it to the Commissioner of Internal Revenue before execution?
>
> Answer. Yes.
>
> Cross-question. You say you don't know whether he read it or not? Do you recollect distinctly whether he did read the contract or not, or did he accept your statement in regard to it?
>
> Answer. I don't recollect whether he actually read the contract. I was impressed with the idea that he did.

Cross-question. He did read the whole contract?

Answer. I was impressed with the idea that he did. He was a careful business man, and usually in matters of that kind he would run over things which I did, either with me or by his comparing it or reading it himself.

Cross-question. You say he left the preparation of that contract to you?

Answer. The drafting of the contract; yes.

Cross-question. And when you submitted it to him do you recollect what you said to him? You don't know whether he read the contract or not, do you?

Answer. I do not. (Rec., pp. 53–54.)

He also testifies that the business was very important business; that it was considered in the office an important matter to have the compensation for imprinting made uniform; also that it was considered a matter of importance to have the salaries for supervision increased. (Rec., p. 55.) And yet, in the face of this tesimony, counsel for appellee asserts in his brief (p. 13): "It appears by appellant's testimony that the Commissioner did not read the contract before signing it, but also relied upon Mr. Johnson." Certainly the presumption is irresistible in a matter of this weight, where the Commissioner had determined upon important specific changes in the new contracts, that when the blanks for the new contracts were submitted to him he read them over to see that they were drawn in accordance with his wishes in the matter,

and especially as to the changes which he had determined upon. So that even if the claimant were correct in its unfounded contention that the Commissioner, on April 25, 1899, intended to put into the new contracts provisions which on June 19 of the same year he omitted, nevertheless the evidence shows clearly that at the time the contracts were approved by him he knew what they contained and that they contained all the new provisions that he desired or intended they should.

As against this evidence that the Commissioner was perfectly well aware of the contents of the contract with the claimant, claimant's counsel made the general assertion in his brief in the court below, and has so contended in this court, that the Commissioner and the Secretary of the Treasury admitted to him that the agreement with the claimant was that contained in the letter of April 25, 1899; also that the claimant's claim of mistake and breach of contract had been made continuously and always freely admitted.

The only evidence which in any way tends to bear out these statements is to be found in the testimony of David Milliken, president of the claimant, to the effect that after he had signed the new contract in behalf of the claimant (without knowing its contents), he was informed that a contract to do the same work had been granted to the American Imprinting Company, which company he knew had not had a prior contract with the Government for imprinting stamps; that he then, for the first time, read his contract and

found that it did not contain provision that no application would be received after the 25th day of May, 1899, nor from any person who did not have a prior contract for imprinting stamps with the Government; that he at once went to Washington and had an interview with Secretary Gage, who admitted that the letter of April 25, 1899, contained the agreement, and stated that the contract with the American Imprinting Company had been granted through inadvertence; that he had frequent subsequent interviews with the Secretary of the Treasury, who at all times freely and frankly admitted that the contract with the American Imprinting Company was in violation of the contract made with claimant. (Rec., p. 43.) He also states that in an interview which he had with the Commissioner of Internal Revenue on or about the 25th day of May, 1899, when he delivered his reply to the circular letter of the Commissioner (Rec., p. 8), the Commissioner asked if he was going to make an application for the renewal of his contract, and he answered yes, but not until the time approached, 12 o'clock, the time for closing; that he did not want to take chances of any applications being put in by persons who did not have a contract on the 25th day of April, 1899; but the Commissioner assured him no such applications would be received.

This is the sum total of the evidence that has any relation whatever to these allegations regarding admissions made by the Secretary of the Treasury and the Commissioner of Internal Revenue. It was all given under objection and was clearly inadmissible.

As regards the Secretary of the Treasury, it is inadmissible because hearsay evidence. Secretary Gage was at the time living in New York City, the home of claimant's counsel, and his testimony could undoubtedly have been obtained. Furthermore, this testimony as to admissions by the Secretary is immaterial, since the Secretary was in no sense authorized to make any such admissions, not being the party who made the contract and having had no relation to the contract so far as is shown by the contract itself (Rec., pp. 3–6), which is the best evidence. As for the Commissioner, there is not a word in this testimony which even indirectly amounts to any of the admissions asserted by claimant's counsel. Finally, neither the Secretary nor the Commissioner, as agents of the United States, had authority to make any such admissions, and this the claimant was bound to know.

But reliance is also made upon certain alleged statements made to Mr. Milliken by Mr. Johnson, chief of the stamp division, regarding the changes in the contract. The testimony on this point is as follows:

> I was informed by the Commissioner that my application was accepted and my contract would be renewed. I then called upon Mr. Johnson, chief of the stamp division of the Bureau of Internal Revenue, and informed him that my contract had been renewed. He then delivered to me two copies in blank of the contract to be executed. Whereupon I said: "I presume the only changes

from the other contract are those contained in the letter or communication dated April 25, 1899?" And he said: "That is all." Whereupon I took the contracts away to New York, and subsequently executed them without reading them. (Rec., p. 43.)

Cross-question. Did Mr. Johnson, in the conversation you speak of regarding the provisions of this second contract, say that it contained anything in reference to the date when applications would be received, or anything in reference to the fact that the contracts were only going to be made with the present contractors?

Answer. He made no specific reference to anything. I asked the question of him: "What does this contract contain; just the changes made necessary by that letter?" And he said: "That is all." There was no distinctive reference to anything at all. (Rec., p. 50.)

Mr. Johnson's testimony on this point is that so far as he knew there was no intention of putting into the contract the provisions which claimant contends were omitted, and further as follows:

Question. Do you remember Mr. Milliken's question as to what was contained in the contract as he has testified about, to you and addressed to you?

Answer. I remember several conversations with Mr. Milliken about the contracts and the method of doing the business, but I have no distinct recollection of the specific matter alleged being discussed in the conversation he refers to.

Question. Did you make any statement to him regarding the contents of this second contract by which you intended to have him rely upon that statement as to such contents solely?

Answer. I did not. The letters and correspondence about the contracts speak for themselves. I presented no extraneous matters, so far as I am advised, except in the conversation about the method, or something of that kind.

Question. Did you at any time make a statement to him regarding the contents of this intended contract, which you intended he should rely on to the exclusion of his finding out himself what was in the contract?

Answer. I did not.

Question. He says that he asked you if it contained the changes referred to in the circular letter, and that you stated it did, and that was the only change. Assuming that his recollection as to that is correct, had you any intention of assuring him that the contract contained statements as to the date when applications would be received and that contracts would be let only to present contractors?

Answer. I did not.

Question. As a matter of fact, it did not contain, as you already testified, any such statements?

Answer. It did not contain any such statements.

* * * * *

Cross-question. Now, at the interview that I mentioned that I had with you, regarding the contents of the contract, there was no intention on my part to mean or say that you misled me

in any way at all; but the question put by Mr. Pradt rather assumed that. Do you recall any conversation that I had with you about that time, on the 25th day of May, after my contract had been awarded to me; or, let me put it this way: Do you recall any conversation, as I have related, in which I stated, or I had asked you, if the new contracts contained anything but the changes provided for or mentioned in the letter of April 25? Do you recall any such conversation as that?

Answer. I recollect a number of conversations you had with me at different times affecting this contract and this work, but I don't recollect any conversation in which the language used by you, or the answer assumed by me, was made or given.

Cross-question. Are you prepared to state that no such conversation may not have been had?

Answer. I am not.

* * * * *

Redirect question. Were you, at the time of the conversations that you had with Mr. Milliken, that he has referred to, authorized in any way, by virtue of the duties of your official position, to make statements to intending contractors as to what the contracts they were going to sign contained, for the purpose of having them rely solely upon what your understanding was of the contents of those contracts?

A. I was not.

Q. Had you any intention of assuming to do anything of that sort?

Answer. I had not. (Rec., pp. 52–54.)

The effect of the testimony regarding the conversation Mr. Milliken had with Mr. Johnson, upon which the claimant relies, is, at the most, that Milliken and Johnson were talking at cross-purposes, Johnson having in mind only those changes which, pursuant to the directions of the Commissioner, he had put into the draft of the new contract, and Milliken having in mind other provisions which he says he supposed it was also intended should be added to the contract; so that Milliken's understanding of Johnson's response was in part an absolute misunderstanding. He does not say that Johnson stated that those provisions were in the new contract, but that he interpreted his answer to mean that; whilst Johnson says he did not intend to convey any such impression, since, as a matter of fact, he knew that the contract *did not* contain those provisions. Add to this the fact that it was the Commissioner and not Johnson with whom the claimant was dealing, and who executed the contract on the part of the defendant; that Johnson had no authority whatever to make any statement respecting the contents of the contract upon which the claimant had any right to rely, and that he had no intention of assuming any such authority, nor of making any such assertion; that the claimant was bound to know this, and that no reason is shown by claimant for making any such inquiries of him—and the sum total of this interview is that Milliken most illadvisedly chose to inform himself as to the contents of a written contract, which he then held in his hand and had but to read, to know exactly,

by questioning a subordinate in the Commissioner's office, without authorty in the premises, in such a way as to totally and inexcusably misconceive the purport of the reply to his question.

The whole evidence, then, establishes clearly that the Commissioner of Internal Revenue, who represented the United States in the execution of this contract, had no intention at any time of putting into the contract the provisions which the claimant says he understood were to be included therein, and that the blank contract which that official caused to be drawn up and printed for the use of all contractors for imprinting stamps contained all that he intended it should contain without omission of any provision which he had at any time intended to include in the same or which he had any intimation that any contractor expected would be included in it. That the provisions which the claimant alleges should have been inserted in the contract were not inherently of such character as properly to be made a part of the contract, but were simply a notification to the various prior contractors of the policy which the Commissioner had decided to pursue with respect to granting new contracts, just as other portions of his letter of April 25, 1899, were mere directions to applicants for contracts respecting the method of making such applications. Finally, on this subject it seems fair to say that Mr. David Milliken, the representative of the claimant, did not at the time he made application for a new contract nor when he received the blanks in duplicate from Mr.

Johnson, have any real impression or belief that that contract contained or was intended to contain the provisions which he now contends it should contain. This conclusion is not only natural and reasonable, but is evidenced by the application itself and by Mr. Milliken's own testimony, very lamely qualified afterward, that he did not mention those things in that application because he did not consider them "relating directly to the subject-matter of the contract." Obviously that was the only sensible view that anyone could have of the matter.

No doubt Mr. Milliken then believed and had reason to believe that the Commissioner would confine the letting of new contracts to the old contractors, but it is reasonable to say that such belief could not and did not extend to the supposition that this declared policy of the Commissioner would or could be expressed in the contract itself.

NO PRELIMINARY AGREEMENT.

The cases cited by claimant's counsel to support the proposition that in a suit to re-form a written contract evidence of the true contract may be found in a preliminary agreement, present in every instance an absolutely different state of facts than in this case.

In the case of *Hearne* v. *Marine Insurance Co.* (20 Wall., 488) there was a plain preliminary agreement consisting of a request for insurance on terms specified, and a reply stating that the policy would issue accordingly, and reciting the voyage it would cover.

A similar state of facts obtained in the case of *Equitable Insurance Co.* v. *Hearne* (20 Wall., 494). The same is true also of the case of *Harvey* v. *United States* (105 U. S., 671), and of all the various other cases cited by claimant. In *Garfielde* v. *United States* (93 U. S., 242) the *only contract* between the parties was contained in the notice, proposal, and acceptance.

In this case, as has been already pointed out, there was nothing like any preliminary agreement between the parties, but simply a notification by the Commissioner to parties contemplating making applications for contracts, and in reply thereto an application by the claimant for such contract, which was accepted by the Commissioner. But this did not constitute a contract. Neither party was bound to anything. If the claimant had subsequently decided that it did not care to execute a new contract, what remedy would the Commissioner have had? And if the Commissioner, in the exercise of that unqualified discretion reserved by him in his circular letter of April 25, 1899, had concluded that after all it was not advisable to let the claimant have a new contract, what remedy would it have had? Clearly no new contract of any sort was entered into until the contract of June 19, 1899, was executed by both parties.

Moreover, fairly construed, this so-called contract is a mere permit or license from the United States authorizing the claimant to print revenue stamps

under certain restrictions intended to protect the Government from fraud, but binding the United States to nothing whatsoever. Indeed, it was expressly stated in the "contract" that the claimant must look for his full compensation for such printing to the persons who might employ him to print stamps. Nor did the claimant agree to print stamps for the Government, but for the public. (Rec., p. 4.)

NEGLIGENCE OF CLAIMANT.

If anything more were needed to absolutely dispose of the claim of mistake made in this case it is to be found in the gross and absolutely inexcusable negligence of the claimant, through the action of its president and representative, David Milliken, jr., in failing to read the contract before he executed the same on behalf of the claimant. This negligence is all the more inexcusable and indefensible when it is remembered that Mr. Milliken was not acting in his own behalf, nor even in behalf of the former copartnership, but of a corporation, which corporation had intrusted to him the duty of applying for and executing an important contract with the Commissioner of Internal Revenue. Mr. Milliken knew that the contract was to contain two additional provisions of much importance to the claimant. He says he also supposed that it was to contain other provisions, which the claimant now asserts were of still greater importance to it. Indeed, he testifies that he would not have executed the contract at all if he had known that it did not contain a provision that no similar contracts would be entered

into with parties who had not held a contract for imprinting stamps during the prior year. And yet, with the printed contract in his hand, requiring only a few minutes of his time to ascertain whether the contract contained this absolutely vital provision, and whether its provision for an increase in the cost of supervision was the $900 which the Commissioner had announced in his letter, or more or less than that sum, and whether or not the contract provided for a uniform basis of prices for imprinting stamps, the absence of which provision in the former contract had resulted in net loss instead of profit to his firm under its prior contract, he, with the most extraordinarily careless and unbusinesslike neglect of a simple and obvious duty resting upon him not only personally but in behalf of the corporation which he represented, failed to perform this plain duty and chose rather to attempt to inform himself respecting the contents of the contract by questions respecting it addressed to a person who was not empowered to reply to such questions with authority and whom he had no reason to suppose to be so authorized. Such negligence is alone sufficient to preclude the claimant from setting up this claim of mistake. In a very similar case this court recently said: "A spark of intelligence on the part of the assured would prompt him to refer to his policy." (*Nederland Life Ins. Co.* v. *Meinert*, 199 U. S., 179.)

In *Glenn* v. *Statler* (42 Iowa, p. 110), a bond was delivered to W. to sign as surety, who did so without reading it, being told that it was a delivery bond. It

turned out, however, to be otherwise. Held, that his gross negligence precluded him from relief on the ground of mistake, citing Story's Eq. Jur., sec. 146, as follows:

> It is not, however, sufficient in all cases to give the party relief that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.

The general principal regarding such negligence is also defined by Story as follows:

> Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances who refuse to exercise a reasonable diligence or discretion. (1 Story Eq. Jur., 13th ed., p. 226.)
>
> But relief is not even given in equity in cases of mistake falling within its rules when the party seeking it could by reasonable diligence have discovered the fact which caused the injury. (*Butman* v. *Hussey*, 30 Me., p. 266.)

The rule is the same even where misrepresentation is relied upon as a ground for relief.

> The rule being in such case that a misrepresentation, in order to affect the validity of a contract, must relate to some matter of inducement to the making of the contract in which, from the relative position of the parties and their means of information, the one must

> necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on the subject of the contract; for, if the means of information are alike accessible to both, so that, with ordinary prudence or diligence, the parties might, respectively, rely upon their own judgment, they must be presumed to have done so; or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness.
>
> *Hill* v. *Bush*, 19 Ark., 528.
>
> *Juzan* v. *Toulmin*, 9 Ala., 684.

But in this case the claimant expressly disclaimed any imputation of deceit. (Rec., p. 53, Cross-q. 8.)

The decisions in this connection relied upon by the claimant are in no way parallel to this case.

In *Palmer* v. *Hartford Insurance Co.* (54 Conn., 488), the facts are stated in the syllabus as follows:

> The plaintiffs had held a policy of insurance of the defendants upon a quantity of merchandise, and upon the policy expiring applied to the defendants for a renewal policy, to be on the same terms with the expiring one, which the defendants promised to give. The defendants wrote and delivered to them a new policy and received the premium. The plaintiffs, supposing it to be on the same terms with the first, did not examine it until after the loss of the property by fire three months later, when, on reading it, they discovered an important variance from the former policy, materially affecting their right of recovery. If they had

> known of the change they would not have accepted the policy. In a suit for the reformation of the policy and a recovery of what would become due under it, it was held that the plaintiffs could not be held to be guilty of laches in not examining the policy and applying earlier for its correction, since they had a right to believe it to be in all essential respects like the former one.

In this case the claimant knew that the new contract was to be different from the old one in essential and important particulars, and says that it supposed that it also contained a provision which the claimant deemed vital and paramount. It was, therefore, its plain duty to make certain that the contract contained these provisions, and it has furnished no reasonable excuse for its neglect to do so.

In *West* v. *Suda* (69 Conn., p. 60) the plaintiff failed to read a written contract a second time before execution, in order to verify erasures made in his presence and at his dictation, and it was held that this did not as a matter of law preclude him from obtaining a reformation of the contract, it having been found that the mistake *was not due to his neglect* but to the error of the scrivener in making the erasures.

The facts thus detailed are clearly not even remotely similar to the facts in this case. The court in that case states the law as follows:

> The rule of law that no one shall be allowed to escape his contract obligations by saying he did not read what he signed is a most wholesome and necessary rule, but as applied to the

> fact of mistake it is a rule of evidence. A failure to read is not always conclusive of negligence. For obvious reasons it is not conclusive in this case. The rule did not bar the trial court from finding that the mistake was not due to the negligence of the plaintiffs (p. 62).

On the contrary, in this case it is impossible for the court to reach any other conclusion than that the mistake, if there was any, was due to the negligence of the claimant.

ONE-SIDED MISTAKE.

The most, then, that the evidence establishes in this case is the mistake of the claimant alone—a one-sided mistake, which is not ground for reforming a contract. (*Hearne* v. *Marine Insurance Co.*, 20 Wall., p. 491.)

NO DAMAGES SHOWN FOR WHICH THE DEFENDANT IS LIABLE.

Tested by the rule of law applicable the claimant in no event is entitled to damages for loss of profits as claimed by it in this case. That rule is that where there is a breach of a contract the party in fault may be made liable for the profits which might have been realized by performance, but such profits must be the direct fruit of the contract, and not too remote or speculative. (*United States* v. *Behan*, 110 U. S., 344.)

> It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such

cases, and not because there is anything in their nature which would *per se* prevent their allowance. Profits which would certainly have been realized but for defendant's default are recoverable. Those which are speculative or contingent are not. (*Griffin* v. *Colver*, 16 N. Y., 491.)

The general rule is that the party injured is entitled to recover all of his damages, including gians prevented as well as losses sustained, but this rule is subject always to two conditions: First, that the damages should be such as must have been fairly in the contemplation of the parties to the contract at the time it was made; and, second, they must be certain, not only in their nature, but as respects the cause from which they proceed, for the law wise y adopts that mode of estimating damages that is most definite and certain. * * * The grounds upon which is founded the general rule excluding profits in estimating damages are: (1) That n the greater number of cases such profits are too dependent on numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ord narily remote and not the direct and immediate result of the nonfulfillment of the contract; (3) the engagement to pay such loss of profits in case of default of performance does not form a part of the contract, nor can it be said from its nature in terms that it was within the contemplation of the parties. (*Witherbee* v. *Meyer* 155 N. Y., pp. 449, 453.)

In the case of *Whorley* v. *Tennessee Centennial Exposition Company* (32 S. W., 346), especially relied upon by the claimant, the defendant had contracted to allow the plaintiff the exclusive sale of cigars, etc., within its grounds, and had violated that contract by permitting others than the plaintiff to sell cigars upon its grounds. The court held that the profits, as nearly as could be ascertained, from these sales, permitted by the defendant in violation of its contract, could be recovered by the plaintiff.

In the present case, however, the claimant has given no evidence whatever of a loss of profits which is the direct result of any breach of the contract of the defendant, assuming for the sake of argument that that contract is to be read as contended for by the claimant, for an examination of the contract shows that, as already pointed out, the defendant made no stipulation whatever as to the amount of work that the claimant might perform. In that respect the agreement is purely unilateral, the claimant agreeing to do such printing of that character as might be offered for the purpose by the public. But even this is qualified by the condition that no stamps shall be imprinted except upon the requisition of the Commissioner or a collector of internal revenue or authorized agent of the Government. So that it is plain that the United States placed itself through this contract under no obligation whatever regarding the volume of work to be done by the claimant, but expressly reserved to itself the right to control through

its agents whatever work was brought to the claimant by the public. As already said, the United States simply granted a license to the claimant to imprint revenue stamps. Not only this, it reserved the right to cancel the contract at any time. Accordingly the action of the Commissioner in entering into the contract with the American Imprinting Company, complained of by the claimant, was not a giving to that company of work which it had been agreed should go to the claimant, since no agreement whatever of that kind had been made by the United States. The most that can be claimed by the claimant is that the *indirect* result of the granting of the contract with the American Imprinting Company was to deprive the claimant of work which *might* have come to it; whilst the amount of such contingent work rests in absolute vagueness and uncertainty, as shown by claimant's own testimony.

For example, Hersey Brown testifies that, the conditions remaining the same, his firm would have been likely to send their work to the claimant if the American Imprinting Company had not been formed. (Rec., p. 21.)

William Badeau makes a similar statement, on the condition that the work of claimant had continued to be satisfactory. (Rec., p. 24.)

Samuel Williams *presumes* the same. (Rec., p. 39.)

All of the various witnesses called to prove the amount of stamps printed by the American Imprinting Company during the fiscal year 1900 testify that

their respective firms or corporations were interested as stockholders in the American Imprinting Company and derived profits from its business, and therefore it was to their interest (and they acted accordingly) to get all the business possible for that company. This, of course, would not have been the case if they had had their work done by a stranger company like the claimant. So the amount of work which they might have given the claimant if the American Imprinting Company had not been formed is necessarily a matter of guesswork.

It is clear then that the plaintiff's claim for lost profits can not possibly be sustained, being profits too remote, speculative, and uncertain, and because they are not directly contemplated in the contract.

It is insisted by the United States, not only that this case should have been dismissed for want of jurisdiction, but that no claim of any sort was shown against the Government, and therefore the judgment of the Court of Claims should be reversed.

HENRY M. HOYT,
Solicitor-General.
LOUIS A. PRADT,
Special Assistant to the Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE MILLIKEN IMPRINTING COMPANY. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

THE QUESTION OF JURISDICTION.

Counsel for the appellee relies on the rule laid down in Pomeroy on Remedies, that an action to reform an instrument and to enforce the same as reformed states but one cause of action, in support of his contention that the Court of Claims had jurisdiction to reform the contract in this case. It is, however, but a rule of procedure pertaining to courts of equity, and based upon the principle that equity demands that the court, having assumed jurisdiction for one purpose, should retain jurisdiction of the case for all purposes in order that complete justice may be done between the parties. (4 Greene (Ia.), 229, cited in brief of appellee.) Such

a rule of procedure can not do away with the *fact* that the demand for reformation of the contract is equitable, and that the demand for recovery of money is legal (*Harrison* v. *Juneau Bank*, 17 Wis., 350), and the statement of that rule does not seem to shed light upon the vital inquiry in this case, which is whether the Court of Claims is empowered to sit as a court of equity to reform a contract. It is conceded that the procedure was correct if the court had jurisdiction to proceed.

THE QUESTION OF MISTAKE.

The brief for appellee, upon the question of mistake here involved, assumes an analogy which does not exist between the facts in this case and those in the cases cited by it. In every case thus relied upon there was a clear undisputed contract contained in written communications between the parties, made prior to the drawing and execution of the formal contract, and containing provisions which were omitted from the formal contract. From this unquestioned contract of the parties, established beyond reasonable doubt, the court was able to say without hesitation that the formal contract was defective and to reform the same. In this case, as has already been pointed out, there was no such contract made prior to the execution of the formal contract by the claimant and the Commissioner. But, conceding for the sake of argument that such an agreement is to be found in the letter of the Commissioner written April 25, 1899, the written application of the claimant for a renewal of its old contract made in response to that letter and the acceptance of such application by

the Commissioner—that therein is contained the contract between the parties, the question at once arises: What is that contract? And reference to the evidence at once demonstrates that there is an irreconcilable difference of understanding between the claimant and the Commissioner of Internal Revenue; who represented the Government, upon the subject of the letter of the Commissioner relied upon by the claimant. The claimant asserts that it understood from that letter that the new contract would contain a provision binding the United States not to let one of the new contracts to any party that did not have a contract with the Government for imprinting revenue stamps at the time that the letter was written. On the other hand, Mr. Johnson, chief of the stamp division in the office of the Commissioner, with whom the Commissioner had conferred about the terms and conditions of the new contracts (A. 11, Rec., p. 51), and with whom the Commissioner had agreed as to the changes to be made in them (A. 1, p. 53), and who prepared the draft of the same by direction of the Commissioner, testifies that there was no intention on the part of the Bureau of Internal Revenue or the Treasury Department, so far as he knew, to put any such provision into the contracts; that it was not put into them and that such omission was not the result of a mistake on his part. (Rec., p. 52.) Certainly the claimant ought to accept as conclusive this statement made by an official upon whom its president and attorney, Mr. David Milliken, placed the implicit, not to say child-like, reliance that he has testified to.

The testimony of Johnson on this point is corroborated by his further testimony that the blank contracts prepared by him and containing the two changes which had been discussed and agreed upon between the Commissioner and himself were submitted by him to the Commissioner (Rec., A. 15 and 16, p. 55), who filled them up, omitting the signatures, and forwarded them to the several parties who had signified their willingness to sign them for the next year. (Rec., p. 51.) And he adds that the Commissioner must have read the contract, because the proposed changes were considered important in the office, and it was the custom of the Commissioner to read important papers which he had to sign. (Rec., pp. 53–55.) The reasonable presumption must also be that he performed this plain duty. Here, then, we have positive and unmistakable evidence that the Commissioner never intended that the new contracts should contain the provision which the claimant asserts it supposed it would contain, and that the supposition of the claimant in this regard was based upon a misunderstanding of the purport of the letter of the Commissioner. That is to say, instead of there being a clear understanding and agreement between the parties upon this point, there was a positive misunderstanding between them on the subject—an utter failure of their minds to meet as to the full purpose of the Commissioner's letter. This disposes of the question, for surely the court could not reform the contract that the parties have executed without clear and satisfactory proof of the real contract. Indeed,

any *reasonable doubt* on that score precludes such action. To quote from one of the authorities cited by the appellee:

> Of course the presumption in favor of the written over the spoken agreement is almost resistless, and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied. But in the case at bar the defendant voluntarily lifts the burden from the plaintiffs and upon the pleadings admits that the deliverd policy is materially variant from the precedent written draft agreed upon. (*Palmer* v. *Hartford Insurance Co.*, 54 Conn., 501.)

ERRORS OF BRIEF FOR THE APPELLEE.

On page 10 of appellee's brief it is stated that the alleged mistake in the contract of the claimant was admitted to the claimant by the Commissioner and the Secretary of the Treasury—referring to "page 52." This reference is apparently to the printed record in the Court of Claims and the correct reference to the Transcript of Record is pages 42 and 43. It contains no such statement by the Commissioner nor is any such testimony to be found in the case.

On page 11 it is asserted that the claimant had an interview with the Commissioner and the Secretary of the Treasury who stated to it that the Commissioner's letter of April 25, 1899, contained the agreement; that the contract with the American Imprinting Company had been granted through inadvertence and that it was a violation of appellee's contract ("pp. 52 and 53").

The reference should be, Rec., pp. 42 and 43. There is no such testimony in the case as to the Commissioner.

It is stated in the brief of appellee that the contract of claimant was approved by the Secretary of the Treasury. The contract is set forth in the Record, pages 3–6, and bears no such approval.

On page 12 occurs the following assertion: "But there is no denial that there was a mistake in the contract in the suit at bar." It has already been pointed out in this brief that Mr. Johnson, who prepared the contract after consultation with the Commissioner with respect to the changes to be made in it from the old contract, denies any such mistake unqualifiedly, and that the acts of the Commissioner himself with reference to the contract constitute a similar denial. Being dead he could not be produced as a witness to this fact.

Counsel for the appellee speak of the salaries that it was required by the contract to pay to the supervising agents of the Government as the consideration of its contract. The contract itself expressly provides that the consideration to be received by the claimant is such compensation as it may get from the public for imprinting stamps for them. (Rec., p. 4.)

HENRY M. HOYT,
Solicitor-General.

LOUIS A. PRADT,
Special Assistant to the Attorney-General.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1905.

Office Supreme Court U. S.
FILED
MAR 6 1906
JAMES H. McKENNEY,
Clerk.

UNITED STATES

vs.

THE MILLIKEN IMPRINTING COMPANY.

No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

DAVID MILLIKEN
Attorney for Appellee.

L. MIDDLEDITCH CO., 68 DUANE ST., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES,
Appellant,

-AGAINST-

THE MILLIKEN IMPRINTING COMPANY,
Appellee.

Argument for Appellee.

This is an appeal by the United States from a judgment of the Court of Claims rendered in favor of the appellee on the 19th day of December 1904, adjudging that the appellee was entitled to a reformation of a contract upon the ground of mistake, entered into by it and the appellant and damages for the breach of the contract as reformed (40 Court of Claims 81). Upon the trial the appellant waived the question of damages and relied upon the want of jurisdiction in the Court of Claims to reform a contract and upon the lack of evidence to support the fact of mistake.

By Act of Congress passed March 3, 1898, the Commissioner of Internal Revenue was required to provide revenue stamps to be placed upon bank checks, drafts, etc., and he was authorized, in the event of being unable to have this work performed by the Bureau of Engraving and Printing, to secure it by contract upon such terms, restrictions and regulations as he might impose. This contingency having arisen, he made a contract with appellee among others, for the period of one year, ending July 1, 1899. Prior to the expiration of its said contract, appellee was invited in writing under date of April 15, 1899, by the Commissioner to make another con-

tract which, as to its terms and conditions, was to be the same as the said former contract, except that the amount of consideration was to be made thirty-four hundred dollars ($3,400) instead of twenty-five hundred dollars ($2,500), a uniform price to be established for the work done and that it was to provide that the appellant would not receive or grant an application for a similar contract from any person or firm or corporation which was not engaged in the business of imprinting stamps under contract with the Government on the 25th day of April, 1899, and further, that no application would be received or granted after the 25th day of May, 1899, which constituted the inducement to appellee to make a contract, and was so meant to be by appellant,as shown by the form of address used in the communication containing it, which was to contractors only and not to the public generally, and without which appellee would not have made the contract. The appellee, in writing, accepted and entered into said agreement, and subsequently executed a contract without examination or reading, upon being informed by a representative of appellant that it embodied the said agreement.

Subsequent to the said 25th day of May, and after the execution of the contract, the Commissioner did receive an application for and grant a similar contract to the American Imprinting Company, a corporation which was not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, and which was organized solely for the purpose of doing that work. Upon learning this, which was prior to the 1st of July, 1899, appellee discovered that its contract did not conform to the agreement it had made, by omiting to restrict the contracts to those who had them on the 25th day of April, 1899, and made application for them before 12 o'clock noon on the 25th day of May, 1899, of which it at once notified the Commissioner and the Secretary of the Treasury, who admitted that the agreement with appellee was that contained in the letter of April 25, 1899, and that the contract to the American Imprinting Company was in violation of the one made with appellee and had been

made through inadvertence. Appellee's demand for the revocation of the wrongful contract was evaded, but it was stated that if it were violated, it would be cancelled. Subsequently it was revoked for violations, but the revocation was subsequently rescinded.

The appellee's claim of mistake and breach of contract had been made continuously and always freely admitted.

The appellee had established its business at great expense, and which had become assured to it by the observance of the agreement in this action, but it became greatly impaired by the violation complained of for the reason that the American Imprinting Company became composed of persons who were having their work done by appellee, were satisfied with it and would have continued it with appellee had it not been for the contract granted to them to do the work for themselves.

The stamp tax on bank checks was compulsory. The appellant created its use and established a uniform price to be charged for imprinting it. All contracts were thus made uniform and no advantage could be given by one contractor over another. The business developed into a selection by the users of the stamps of the contractor to whom they would give it. Appellee had but one competitor within its territory, who, for strong trade reasons and dissatisfaction with his work, would not have been given the business lost to appellee who had the good will of the trade.

The appellee had provided a large plant and force, made a profit on its business and could have done the business it lost, for the additional expenses incidental to it.

The appellee suffered damage in the loss of profits on business in the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99).

These allegations of the petition are not controverted or denied by the evidence.

POINTS.

I

The Court of Claims proceeding as a Court of Equity: has power to reform a contract.

The Tucker Act (24 Stat L. p. 505.)

This court, in the United States against Jones, 131 U. S. I. construed that act as extending the jurisdiction of the Court of Claims to include claims for money arising out of equitable and maritime, as well as legal demands.

What constitutes an equitable demand was clearly defined by this court in the case of Harvey against the United States (105 V. S. 671). The Court of Claims at that time having no equity jurisdiction, the Congress, by special act, referred to it the claim of Harvey, to adjust the accounts between the parties as a court of equity jurisdiction, so far as they were *equitable unadjusted demands*, growing out of the contract the parties *intended* to make. The court then upon a trial reformed the contract and awarded damages for its breach as reformed. Upon appeal to this court, the judgment of the Court of Claims was affirmed, and an "equitable demand" was judicially defined as including an action for reformation of a contract, and damages for its breach as reformed.

The Tucker act subsequently passed extended the jurisdiction of the Court of Claims generally, as defined by this court in Jones vs. V. S. supra to include "equitable demands."

In the case of South Boston Iron Works viz The United States 34 *Ct* of Claims, 200, the court held that it had equity jurisdiction to reform a contract. This question was raised by the pleadings and the contention of the parties and was decided by a full bench. There was no appeal taken from that decision.

However, a recent decision of this court in District of Columbia against Barnes, 197 U. S. 146 distinctly holds that the Court of Claims has power to reform a contract.

In the lower court the only case relied upon by the ap-

pellant, was Jones *vs.* The United States, *supra.* That action was for a specific performance and clearly is not analogous.

In the case of District of Columbia *vs.* Barnes, 197 U. S. 150. it was held that "This court does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here." "The province of the Court of Claims is to pass upon the justice of the claim and adjudge accordingly." Id. 151 "One who has the right to money relief upon a contract mistakenly omitted to be reduced to writing in accordance with the true agreement of the parties, has a claim of equitable cognizance, for the contract must be reformed to meet the intention of the parties and when corrected may be adjudged a valid claim." Id. 152.

"The Court of Claims may determine the money relief to which the claimant is entitled, whether arising out of an equitable or legal demand." Id. 152. "The facts found by the Court of Claims are conclusive upon the United States Supreme Court." Id.

pellant was Jones vs The United States, supra. That action was for a specific performance and clearly is not analogous.

II.

A contract may be reformed and enforced as reformed. in the same action.

Harvey *v.* U. S. 105 U. S. 671;
Avery *v.* Eq. Assn. Soc'y, 52 Hun. 392;
Maher *v.* Ins. Co. 67 N. Y. 283;
Jaye *v.* Ins. Co. 55 N. Y. 657;
West *v.* Suda, 69 Conn. 60.

A bill or complaint which asks the rectification of a mistake in a written contract and the enforcement of the instrument as reformed states but one cause of action.

Harvey v. United States, 105 U. S. 671;
Avery *v.* Ins. Co. 52 Hun. 392;
Maker *v.* Ins. Co. 67 N. Y. 283;
Jaye *v.* Ins. Co. 55 N. Y. 657;
West *v.* Soda, 69 Conn. 60;
Hutchinson *v.* Ainsworth, 73 Col. 452;
Franklin Ins. Co. *v.* McGea, 4 Greene (Iowa), 229:
McClurg *v.* Phillips, 49 Mo. 315;
Mayer *v.* Van Cullam 7 Abb. Pr. (N. Y.) 222.

"Actions to reform instruments and to enforce the same as reformed by judgments for the recovery of money, constitute but one cause of action, however various may be the reliefs demanded and granted."

Pomeroy on Remedies, sec. 459.

In the case of Mayer *v.* Van Cullam, reported in 7 Abb. Pr. (N. Y.) 722, the nature of this action is clearly defined as follows:

"The unity of the right to be enforced or the wrong to be redressed, constitutes the unity of the action. The kind or the multifariousness of the proceedings in an action

does not affect the unity of the action, which depends solely on the unity of the right to be completely enforced or the wrong to be completely redressed. In actions to collect debts, the wrong is the detention or non-payment of the debt and the wrong has been completely redressed, when the creditor has got his money. But because the complaint not only asks for judgment, but for a receiver and injunction, remedies which the plaintiffs are clearly not entitled to before they have got their judgment, does it follow that it contains another cause of action or more than one cause of action. Certainly not, because these remedies are asked for the purpose of collecting the *same* debt, or in other words, as means to redress but one wrong and the same wrong."

III.

The defendant had power to make the contract with the petitioner.

Act of March 3, 1899.

IV.

The contract was approved by the Secretary of the Treasury (p. 20).

This approval may be shown circumstantially.

V.

The written application in connection with the proposal and the acceptance of that application constitutes the contract between the parties.

Hearns *v.* Ins. Co. 20 Wallace, 488;
Equitable Ins. Co. v. Hearns, 20 Wallace, 494;
Harvey *v.* U. S. 105 U. S. 671;
Garfield *v.* U. S. 93 U. S. 242.

In the latter case, the court held, that proposals and acceptances are not required to be drawn as if they were subject to the criticism or dissection of a demurrer in a court of law.

There was in the first written draft agreed upon by the claimant and defendant, the contract between them.

Palmer *v.* Hartford Ins. Co. 54 Conn. 510

In the case of the Equitable Ins. Co. *v.* Hearne, which was an action to reform a policy of insurance, the court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own, with care. It is to be presumed he did so. He had a right to assume that the policy would actually conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny and, if it were necessary, threw him off his guard."

The letter of the Commissioner dated April 25, 1899 and received by appellee (p 51), is admitted by appellant (pp. 61, 62).

The appellee's letter of acceptance made in accordance with the Commissioner's letter (pp. 15,16) was delivered to the Commissioner, (pp. 51,52), was accepted by him and appellee's application was granted (p 52).

This is not denied.

Thus the letter of the Commissioner dated April 25, 1899 (pp. 5,6), became the contract between the parties.

VI.

Where the agreement, as reduced to writing, omits terms or stipulations contrary to the common intention of the parties, the instrument will be corrected or reformed, so as to make it conform to their real intent.

Hearne v. Marine Ins. Co. 20 Wallace, 488;

Hunt *v.* Rousmainer, 21 U. S. 174;
Andrews *v.* Essex Ins. Co. 30 Mason, 10;
Oliver *v.* Mutual Ins. Co. 2 Custis, 277;
Van Tuye *v.* Ins. Co. 55 N. Y. 657;
Pomeroy's Eq. Jur. Vol. 2, Sec. 849;
1 Story's Eq. Sec. 152.

"The office of a bill for the reformation of an instrument is not to establish and affectuate rights not to have the effect of the deed adjudged but rather to decline the status which the parties intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted and defended. The real question is, not what the real instrument was intended to mean or how it was intended to operate, but what it was intended to be."

Tillis *v.* Smith, 108 Ala. 264;,
Connor *v.* Armstrong, 86 Ala. 265;
Midland R. R. Co. *v.* Brown, 98 Ala. 647;
Parker *v.* Parker, 88 Ala. 362,

The court held in Hunt *v.* Rousmainer, that the advertisement inviting proposals and the written bid of the claimant accepted by the proper officer of the United States, but left out of the agreement by accident or mistake, was proper to be considered by the court in determining the rights of the parties, and the contract was reformed to the extent of making such advertisement a part of the contract.

The contract in the suit at bar omitted, by mistake, to provide as agreed upon, that no application for a similar contract would be received from any person, firm or corporation not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, and that no application would be received after the 25th day of May, 1899 (pp. 5,6). By the preliminary agreement (pp. 5,6), the appellant precluded any discussion of the terms, etc., of the contract which included the aforesaid restrictions, by stating that *it had determined to add them to the contract*, thus compelling their acceptance.

The mistake, which is thus clearly shown is not denied.

The evidence relied upon by the appellee to establish the mistake is the letter of the Commissioner (pp. 5,6), and the appellee's acceptance (pp. 15,16).

It is documentary and indisputable.

Appellant's only witness testified that the letters and correspondence *about the contract* speak for themselves.

This admits that the preliminary agreement constitutes the real contract.

The only evidence which might be claimed to be against this admission and the documentary evidence of the appellee, is that of the appellant's witness, who testified that so far as he knew, there was no intention of including the restrictions in the contract (pp. 60, 61).

This is evidence and is not a denial, and is parol. If it means anything, it is that an attempt was made to deceive appellee.

Upon this the learned Chief Justic of the Court of Claims, in his dissenting opinion in Harvey *v.* The United States, said: "The court will not allow the defendant to impute *quasi* fraud to its own act." This view was adopted by the Supreme Court.

But the appellant's evidence is all in support of the claim of mistake.

Its only witness, E. C. Johnson, testified that he prepared the contract (pp. 60, 62), and it being desired to reduce the number of contractors, *the changes in the contract* were made (p. 60). He testified that the object of restricting the contracts to those who had them on the 25th day of April, 1899, and not to receive any application after the 25th day of May, 1899, *was to reduce the number of contractors* (pp. 60, 64). *The changes in the contract*, which he thus testified were to accomplish this (p. 60). were therefore clearly omitted by mistake.

Mr. Johnson testified further (p. 63), that after preparing the contracts he submitted them to the Commissioner. but he does not know wheher the Commissioner read them or not, and that he did not know whether the restrictions were to be included in the contract or not (p. 61), but he does not know whether the Commissioner read them or not, and that he did not know whether the re-

strictions were to be included in the contract or not (p. 61), but he also testified (p. 62) that it was the intention to restrict the contracts to those who had them on April 25, 1899 and not to receive applications for contracts after 12 o'clock noon on the 25th day of May, 1899. and therefore *good faith* should prevent any objection to the reformation of the contract as sought. He was not instructed to omit the restrictions from the contract and when the appellee discovered the mistake it was admitted by the Commissioner and the Secretary of the Treasury (p. 52).

It will be observed that there is no denial of the claim of omission. The Commissioner admitted the agreement to restrict (p. 52).

The question presented is one of evidence—

West *v.* Suda, 69 Conn. 60—

for which it is not necessary to look beyond the preliminary agreement.

Harvey *v.* U. S.

The question of "mistake" is one of fact.

It is clearly shown by the proposal and acceptance and the admission of the Secretary of the Treasury.

The evidence on behalf of appellant is, that it was their intention to restrict the contract and limit the time within which bids should be put in.

This surely is in corroboration of mistake. Then why not put it in the contract?

In United States against Smith, 94 V. S. 214-218, "this court said that it does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record."

VII.

Subsequent conduct is important in determining the fact of omission.

Simpson *v.* U. S. 172 U. S. 372.

Appellee discovered almost immediately after the execution of its contract (p. 52) that it did not express the real intention of the parties, in that it omitted the restrictions as to contractors and time limit for applications. It then had an interview with the Commissioner and the Secretary of the Treasury, who stated that the letter of April 25, 1899, contained the agreement; that the contract to the American Imprinting Company had been granted through inadvertance (p. 52), and that it was a violation of appellee's contract (p. 53).

This has at all times been admitted (p. 53) and is not denied by the evidence.

On page 56 of the evidence it is made to appear that appellee did not specifically mention the restriction of the contracts in its acceptance, because it did not consider that they related *directly* to the subject-matter of the contract. This is made clearer and is corrected on pages 19, 20, 21, where it is shown that they constituted the inducement, and that without them it would not have made a contract.

Its conduct has always been consistent upon this point; it has always claimed the omission.

In its letter of acceptance, which it states is made in accordance with the Commissioner's letter of April 25, it specifically mentioned only the matters it was obligated to do (p. 19).

The appellee had built up its business at great expense (p. 20); it had but one competitor (p. 20), from whom most of the stationers had withdrawn their business when claimant began, because he had done it unsatisfactorily (pp. 26, 36, 37, 40, 42) and because he was a competitor of the stationers in making bank checks, etc.; it was against their interest to entrust their business to him, for the reason that he would ascertain for whom they were doing business and to what extent, and could also copy their forms or styles of checks (pp. 36, 37, 42, 45), while appellee's sole business was the imprinting of the stamp.

Therefore appellee had the good will of the trade and was enabled to estimate the value of its contract. Its business could be preserved only by the restriction of the

contracts as agreed upon. By limiting the number of contracts as agreed, the volume of appellee's business would have been preserved as well as increased, hence the restrictions constituted the inducement to make a contract. and without them it would not have made it (pp. 20, 21).

Any claim that the mistake must be mutual is without avail.

But admitting for the purpose of the argument that the mistake must be mutual, the preliminary agreement (pp. 5,6), contains complete evidence that it was mutual. That is the best evidence of it and even though there should be a parol denial, the court would not consider it as against the documentary evidence.

But there is no denial of it. This Court in Harvey *v.* U. S. held that it made no difference whether the defendant shared in the mistake or not, *the contract was the written bid in connection with the advertisement and the acceptance of that bid.* Citing Garfield *v.* The U. S. and Equitable Ins. Co. *v.* The U. S. Thus clearly establishing what constitutes the necessary evidence of mistake and refusing to consider parol evidence against documentary evidence.

But there is no denial that there was a mistake in the contract in the suit at bar.

VIII.

The omission of appellee to read the final contract before execution does not affect its rights. The courts hold that he is not required to read it. West *v.* Suda, 69 Conn. 60. If it were so required a claim of mistake would cease to be a cause of action. Hence it is, that omission to read is the basis of the action for mistake and is presupposed.

The appellee *had a right to assume* that the contract would conform to the agreement made.

The rule of law that no one shall be allowed to escape his contract obligations by saying he did not read what he signed, is a most wholesome and necessary rule, *but* as applied to the fact of mistake, it is rule of evidence.

West *v.* Suda, 69 Conn. 60.

This rule is subject to the limitation that it is not to be applied in behalf of any person who by word or act has evidenced the omission to read.

Palmer *v.* Hartford Ins. Co. 54 Conn. 510.

This application of the rule was made in an *action at law*. In equity, of course, it would be much broadened.

The omission by appellee to read the contract before execution was based upon the assurance of Mr. Johnson, appellant's representative, that the only changes in it from the existing one were those contained in the letter of April 25 (pp. 52, 56, 59), which was the preliminary agreement. This is corroborated by Mr. Johnson, who testified that he could not say that he did not so assure claimant (p. 62).

It is shown that Mr. Johnson had the charge of preparing the contract and he therefore was a proper person for appellee to consult (pp. 60, 62).

It appears by appellant's testimony that the Commissioner did not read the contract before signing it (p. 63) but also relied upon Mr. Johnson.

It was not an original contract but the renewal of an existing one with some changes which appellee was compelled to accept (pp. 5, 6), and therefore less likely to scrutinize it.

IX

There is no rule of law which fixes the period within which discovery may be made that a writing does not express the contract which it was supposed to contain, and which bars relief for delay in asserting rights, short of the period fixed by the statute of limitations.

Palmer *v.* Hartford Ins. Co. 54 Conn. 509;
Phoenix Ins. Co. *v.* Gurnee, 1 Paige, 278.

In the same case it was held, that, "The Court of Claims is not bound by special rules of pleadings. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States. (United States

against Burns 12 Wall, 246; U. S. *vs.* Behan 110 U. S. 338).

X

It cannot be contended that the restriction in the proposal of the contracts to those who had them, was a mere notice.

The proposal (p. 5), says, "it has been determined to add the following *provisions* to the existing contracts. Among them is the restriction. There are no quotation marks to divide or separate it, so it must be taken as a whole. The Secretary of the Treasury, whose approval of the contracts and of the terms, conditions and restrictions upon which they were made, was necessary, said that the "proposal" (p. 5) was the agreement and that the contract complained of was a violation of it(p. 52). He could have been called to testify by the appellant whose witness he properly was, in New York, where testimony was taken but he was not. The only witness for the appellant testified that it was their intention to restrict the contracts and not to receive applications after May 25, 1899 (p. 62). Then why object to putting it on the contract? There is no denial that it was to be included in the contract or that there was a mistake in leaving it out.

The "proposal" was addressed to existing contractors *only* it was not a general announcement. The public was excluded from bidding. To whom, then, could it be a notice? It would be absurd to say that it was a notice to the public, who had been excluded, through and by way of the contractors. It certainly was not a *notice* to the contractors, for the proposal was and was intended to be addressed to them only and for their benefit. It was the agreement, and was intended to be just as much of an inducement to make a contract as was the compensation and was meant to increase their profits (p. 53). Upon discovering the wrongful contract, which was very soon after it was made, appellee at once protested to the Secretary of the Treasury, the Commissioner being absent, when the proposal (p. 5) was admitted to be the contract (p. 52). This is not denied. It is clear that the appellee

always considered the rstriction a part of the contract. Good faith should prevent opposition to the claim of mistake.

Again the limitation of time with which bids should be submitted, was material, for it is inconceivable that any person would enter into a contract involving the great expense of providing a plant, were it left open to the other party to the contract to practically nullify it, by granting the same privilege at any time to others. Hence, limiting the time for bids to the 25th day of May at 12 m. constituted one of the chief inducements to appellee to make the contract, as the competition it would meet was then fixed and certain.

However, this is a suit in equity, and the court will consider it only with a view to rendering substantial justice. Will it therefore set aside the unanimous conclusion of the court below, that justice, which is the purpose of that court, requires the establishment of the appellee's rights as claimed by it?

The reformation of the contract could work no injustice to appellant, for the omitted provisions, it admits contained its intentions, and there isn't a line of evidence to show that they were not to be embodied in it..

The contract was of great pecuniary advantage to the appellant, for it received the full face value of each stamp without any expense and its supervision of the work was paid for by appellee.

XI.

It can not be claimed that the omitted provisions did not properly pertain to the contract.

Without the provision limiting the time of application for contract, appellee would not have made one, for it precluded the appellant from granting similar contracts during the life of appellee's. Otherwise it would have defeated its object, which was the profits to be derived from it. This applies with equal force to the restriction of contracts, for there was but one other contract within

appellee's territory, the force of which was of but little signifiance, as appellee possessed the good will of most of the persons requiring the imprinting of stamps. But, in any event, the court has power to consider it in this action as operating as a breach of contract.

XII.

No question of public policy or interest can arise.

The interests of the public could not have been served by the granting of additional contracts, for the reason that the price to be paid for the work was absolutely fixed by the appellant and no deviation from it permitted, and the service provided was ample. Furthermore the act authorized such terms, restrictions and regulations as the Commissioner might impose.

XIII.

Appellant having received an application for and granted a contract similar to the one entered into with appellee and subsequently to the 25th day of May, 1899, to the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, violated its contract with appellee and is liable in damages.

The appellant's witness, E. C. Johnson, testified that the American Imprinting Company was not imprinting stamps under contract with the Government on the 25th day of April, 1899, (p. 63), and that its application for a contract was made and granted subsequent to the 25th day of May 1899, (p. 6).

The contracts were limited to those who had them on the 25th day of April, 1899, by the preliminary agreement (pp. 5, 6).

XIV.

The broad general rule is, that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained, upon a breach of contract.

Adams' Case, 1 Ct. of Cl. 106;
United States *v.* Behan, 110 U. S. 338;
Hitchcock *v.* City of Galveston, 3 Woods, 294;
Griffin *v.* Colver, 16 N. Y. 489;
Witherbee *v.* Mayer, 155 N. Y. 446;
Wittenberg *v.* Mollyneux, 83 S. W. 842;
Bagley *v.* Smbith, 10 N. Y. 446;
Masterston *v.* Mayor, 7 Hill, 62;
Hale on Damages, p. 73;
Russell *v.* Horn, 59 N. W. 901;
Hale *v.* Hess, 46 N. W. 261;
DeHorton Co. *v.* Hopkins, 53 N. W. 501;
American Building & Loan Association *v.* Hunt 50 Pac. 468;
Mueller *v.* Bethesca Co. 50 N. W. 319.

The law governing the question is elementary. Damages arising naturally from a breach of contract may be recovered whether actually contemplated or not.

Hadley *v.* Baxendale, 9 Exch. 341.

Pecuniary losses are sustained when the profits of a contract are lost or the *earning capacity* is reduced.

Hale on Damages, 87.

The fact that damages are difficult of ascertainment and that the jury must, to some extent, speculate as to their amount, can not release the party in default on his contract from liability thereon.

Stossell *v.* Greenwich Ins. Co., 20 App. Div. 188: 46 N. Y. Supp. 802.

In the case of the U. S. *v.* Behan, 110 U. S. 338, the court held that profit and losses must be determined according to the circumstances of the case and the subject-matter of the contract.

The case of Whorley *v.* Tennessee Cent. Ex. Co. 62 S. W. 346, bears directly upon the case at bar. There

the defendant granted to plaintiff the exclusive right to sell tobacco, cigarettes and cigars within its grounds for a consideration. It was averred that defendant had violated its contract by allowing others to sell tobacco, which was denied. At one place it was shown that cigars were given as prizes for knocking down rag dolls. At another place, an encampment of soldiers, they were sold, and at a private club. These were all held to be violations. The court said upon the question of the amount of damages, it is shown in the proof, that on the business done the complainant made a net profit, had made all his preparations, built his stnds, acquire his space, paid his rent and had his help hired. Having all this, it would appear to follow that all additional sales made by him would be so much additional profit and that on all sales lost he would lose his profit. It is not a case of speculative or doubtful profits. Goods sold in violation of the contract should be treated just as if they had been sold by the Centennial Company itself, and that the complainant should be allowed just such profits as he would have made if he had sold the same amount of goods. It was impossible to determine the exact amount of sale made, but the court assessed the damages.

In the case at bar it is shown that the appellee had been doing the business of Stewart, Warren & Co., Brown, Lent & Pett Milton C. Johnson & Co. Wm. Mann Co., J. H. Warner, and Styles & Cash, and would have continued to do it, had it not been for the contract to the American Imprinting Company, which they organized for the purpose of making the profit on their own business (p. 53).

John T. Stewart testified that they had had their work of imprinting stamps done by the Franklin-Lee Company, who did it so unsatisfactorily that they transferred it to appellee when it began (p. 26), who continued to do it down to July, 1899, when the American Imprinting Company began business. He was an organizer and stockholder in that company, which was composed of stationers and organized for the purpose of imprinting stamps upon checks, etc., (p. 26) for themselves (p.26), and that if it had not been for the contract to the American Imprinting Company they would have continued to give their busi-

ness to the appellee (p. 26). That their work done by the American Imprinting Company cost less than if done by the appellee, because they, as stockholders, made a profit on the business, and the reason they formed the company was to have the profit that the appellee would otherwise have reaped (pp. 27, 28, 29).

The testimony of all the other witnesses is to the same effect (pp. 29, 30, 32, 33, 34, 35, 38, 41, 42, 48, 49, 50, 51,). They testify to the dissatisfaction with the work which had been done by the only competitor of appellee and to the objection to his being a competitor of theirs in making checks, etc. (pp. 26, 40, 42, 36, 37, 42, 45).

This is clear evidence of a direct loss of profits on business to appellee arising from appellant granting the contract to the American Imprinting Company.

The appellee shows that its plant, space, help and force were sufficient to do the additional amount of business which it lost, with the addition of incidental expenses enumerated (pp. 20, 53, 58); that it had made a profit on its business (pp. 22, 53, 58), and had paid to the appellant thirty-four hundred dollars ($3,400), the consideration for its contract (p. 53). The appellee shows (p. 20) that one-half of its plant became idle through the granting of the wrongful contract.

It therefore clearly follows that all additional business done by appellee would have been so much additional profit, and that on all business lost it lost its profit.

The amount of loss of business to appellee was as follows:

Stewart, Warren & Co.,	(p. 26)	9,278,207	stamps.
Brown, Lent & Pett,	(p. 30)	2,721,859	"
M. C. Johnson & Co.,	(p. 49)	5,000,000	"
J. H. Warner,	(p. 34)	3,663,093	"
Wm. Mann Co.,	(p. 47)	5,705,000	"
Styles & Cash,	(p. 38)	2,219,350	"
Which at eighty cents a thousand, the contract price, amount to a profit of . . .			$22,869 99
From which is to be deducted the expenses of doing this additional amount of business (p. 20)			2,285 00
Making the total loss of profits (p. 20) . .			$20,584 99

Appellee also provided one new press at a cost of $700, upon which it suffered a loss of $500 (p. 20).

The total amount of appellee's loss was $21,084.99, of which there has been no assignment or transfer (p. 20).

XV.

The payment by appellee to appellant of a consideration amounting to thirty-four hundred dollars ($3,400), for its contract, broadened its rights and entitled it to the fullest protection.

The appellant reaped very large benefits from the contract, through receiving two cents for each and every stamp imprinted free from any expense. The nine hundred dollars additional consideration was a special consideration for the restriction of the contracts (p. 20, 22).

XVI.

There was no change in the parties claimant.

The evidence shows that the original contract was made with David Milliken, Jr., & Co., which was formed for the sole purpose of operating under it (pp. 54, 57), and who made the application for the contract in the suit at bar, but desiring to change the description of the persons constituting that firm, was permitted by the Commissioner to substitute the name "The Milliken Imprinting Company," and the contract was made out in that name (58). The parties were identical and the same (p. 58).

This is not denied and is shown by the contract itself (p. 6).

Equity would not allow the appellant to take advantage of such permission.

XVII.

The appellee has always been loyal to the Government.

XVIII.

The judgment of the Court of Claims should be affirmed.

DAVID MILLIKEN.
Attorney for Appellee.



Supreme Court of the United States.

No. 227.—October Term, 1905.

The United States, Appellant,
vs.
The Milliken Imprinting Company. } Appeal from the Court of Claims.

[April 30, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition praying for the reformation of a contract and for damages for breach of the same as reformed. The Court of Claims granted the prayer and made a decree for damages, 40 C. Cls. 81, whereupon the United States appealed to this Court.

The contract is an elaborate and formal instrument, dated June 19, 1899, under the seal of the petitioner and executed on behalf of the United States by the Commissioner of Internal Revenue. It is unnecessary to state its terms. Members of a partnership subsequently incorporated as the petitioner had a contract of like sort expiring July 1, 1899. On or about April 25, 1899, they received from the Commissioner of Internal Revenue the following communication bearing that date:

"*To contractors for imprinting stamps:*

"In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps.

"Each contractor will be required to pay salaries aggregating thirty-four hundred dollars ($3,400) per annum for one Government stamp agent and two counters, payable monthly.

"As compensation in full for imprinting stamps, the contractor shall charge all persons requiring the same the sum of eighty cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and one dollar per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet. In order to secure absolute uniformity in prices these charges shall be rigidly adhered to, and any evasion or attempted evasion of the express terms hereof shall be deemed a violation of the terms of the contract.

"No application for contract to imprint stamps for period named will be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government.

"Each application for contract must be accompanied by the guarantee of at least two responsible persons, that in case contract is entered into and accepted, bond will be furnished in the sum of twenty-five thousand dollars ($25,000) for the faithful performance thereof.

"The Commissioner reserves the right to reject any or all applications and to cancel any contract wherever and whenever it shall appear to the interests of the public and the Government to do so.

"Applications will be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until 12 m., May 25, 1899, such applications to be carefully sealed and marked 'Applications for contract for imprinting internal revenue stamps' and addressed to the Commissioner of Internal Revenue.

G. W. Wilson,
Commissioner."

On May, 25, 1899, the firm wrote to the Commissioner stating that they then had the privilege to imprint stamps, &c., and "would most respectfully make application to you for a contract to continue the same for the period of one year, commencing July 1, 1899, and in accordance with your official communication, dated April 25, 1899, we to pay salaries aggregating thirty-four hundred dollars for one Government stamp agent and two counters, and to receive as compensation for imprinting stamps the sum of eighty cents per thousand when imprinted upon sheets containing five or more stamps and one dollar per thousand when imprinted upon sheets containing less than five stamps per sheet." They added that they attached a guarantee to furnish the required bond and referred to letters accompanying the original application. This letter now is denominated an acceptance of what is called the offer of April 25, above set forth. The alleged mistake is the omission, from the formal contract, of the paragraph in that communication, to the effect that no application will be considered from any person not now engaged in printing stamps under contract with the Goverment, and the following one limiting the time for applying to May 25. After May 25 an application was accepted from the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the Government on April 25. The damages awarded were the profits which would have been made by the petitioner had it not lost the customers who went to the corporation last named.

The Government objects at the outset that the Court of Claims has no jurisdiction in equity, and that, although the petitioner's demand is for money under a contract as it should have been drawn, yet in this suit that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action at law, but can be granted

only in equity. When relief is granted also on the contract as reformed it means only that the court of equity sees fit to go on and finish the whole case. But we are of opinion that the Court was warranted in taking jurisdiction under a fairly liberal interpretation of the act of March 3, 1887, c. 359, § 1, 24 Stat. 505. That section gives the Court of Claims jurisdiction of "all claims founded . . . upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." A claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract, seems to us to fall within these words, in their obvious, literal sense. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150, 152. *South Boston Iron Works* v. *United States*, 34 C. Cl. 174, 200.

We come then to the merits. It is unnecessary to consider whether the Court of Claims ought to have made the findings of fact required in an ordinary case. We leave that question where we find it. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150. *Harvey* v. *United States*, 105 U. S. 671, 691. For we are of opinion that the United States was entitled to a ruling as matter of law that there was no evidence which would warrant a decree for the petitioner; and therefore it would be a useless form to send the case back for findings to be made.

The petitioner's case depends on the assumption that the communication of April 25 was an offer and that the letter of May 25 was an acceptance. But obviously this is a mistake. The former is a notice, not an offer. Its very first words, "In awarding contracts," contemplate the necessity of further action on the Commissioner's part. The clause which it is said should have been inserted speaks of an "application for contract," the right to reject applications is reserved in terms and directions are given for sending them and as to the time within which they will be received. In like manner the letter of May 25 purports to "make application to you for a contract," and refers to recommendations, thus showing that it was understood that the Commissioner might refuse what was asked. No preliminary agreement was made and there was no new contract until the instrument sought to be reformed was signed. It is true that Milliken, the president of the petitioner in the Court below, says that he was informed by the Commissioner that his application was accepted and his contract would be renewed. But he goes on to say that he then called on the chief of the stamp division, was informed by him that it had been decided that the application of any person who had a contract would be granted, and received blank copies of the contract to be executed, so that the acceptance was contemporaneous with the delivery of the instrument

informing the petitioner of the terms. There is no room for the application of *Harvey* v. *United States*, 105 U. S. 671, and similar cases, upon which the petitioner relies. The only effect of the testimony is to confirm by the conduct and language of the parties the interpretation of the previous communications, which does not need that confirmation to be plain. It should not pass unmentioned that the communications were between the Commissioner and the firm, and therefore not even with the same person that brings the present suit.

In strictness it is not necessary to go further. For the parol testimony which we shall mention amounts to nothing, except upon the footing that there was a preliminary written agreement. But it is proper to add that it is doubtful, at least, whether the two letters bear the interpretation which the petitioner now puts upon them. It is plain that not all the paragraphs of the notice to contractors after the first were provisions to be added to future contracts. That which follows the one in question was on the face of it simply information as to what the applicants must do. The last paragraph, fixing the time within which applications would be received, also obviously was a self-protecting notice only, and although the petitioner does set it up as properly a term of the agreement, the averment is only by way of make-weight to what mainly is relied upon, and we hardly think that it needs discussion. The communication was a general form to instruct and direct applicants for contracts. The most natural meaning of the clause principally in question was simply to give notice that applications from persons not already engaged in imprinting stamps would not be considered and thereby to limit the applications sent in. It is not natural to read it as intended to contract the Government out of its right to employ new persons in case a need to do so should arise.

The petitioner's letter also in its most natural interpretation would confine the changes in the contract to the requirements concerning salaries and the rate of compensation. It is true that it contains the general words, "and in accordance with your official communication dated April 25, 1899," but it goes on to show what it regards as the elements of that communication material to the contract by the following words. It mentions salaries and the rate of compensation, nothing else. The words quoted are not an independent clause but they qualify the next phrase "we to pay salaries" &c. On these two letters, even if they had made a contract, which they did not, the Government hardly could have been held to the disputed terms. It may be mentioned further that Milliken testified that when he wrote that letter he did not consider the clause in question to relate directly to the subject matter of the contract, and although at a later date he stated that he desired to modify his testimony, the only intelligible modification, if it be called one, is that his testimony related to the time when he wrote the letter, not to the time when he received the contract to be signed.

After what we have said but a few words need be added with regard to the parol evidence offered. Milliken says that when he received the blanks he said to the chief of the stamp division that he presumed the only changes from the former contract were those contained in the letter of April 25, was answered, "That is all," and thereupon afterwards executed the contract without reading it. If this were undisputed and had come from any one authorized to bind the Government, still, whatever effect, if any, it might have upon an undisclosed insertion, it would afford no ground for complaint at an omission, especially an omission of the paragraph we have discussed. The answer was true in letter and spirit, and in no degree warranted the inference that the blanks contained the disputed clause. The petitioner executed those blanks without any ground whatever for assuming that they contained anything which they did not, even if Milliken had been right in what he says he supposed to be the import of the notice of April 25.

Finally, there is not a particle of evidence that the contract was not drawn just as the United States, through its representative, the Commissioner of Internal Revenue, intended that it should be, and for this reason again reformation must be denied. It is true that Milliken testifies that the Secretary of the Treasury admitted to him that the contract with the American Imprinting Company was in violation of the contract with the petitioner. But it is left doubtful, at least, whether the Secretary knew anything about what contract was intended to be made. The act of March 3, 1899, c. 424, 30 Stat. 1090, 1091, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to procure certain stamps by contract, to be awarded under such terms, restrictions, and regulations as might be prescribed by the former with the approval of the latter. But that is not sufficient to warrant an assumption that the Secretary gave directions or had knowledge as to the intended form of the contract. Moreover, so far as appears, the Secretary did not suggest or admit that there was any mistake in the form of the instrument. It would seem that Milliken exhibited to him the notice of April 25 as containing the Government's agreement, and that the Secretary fell in with Milliken's interpretation of the paper, but refused to do anything until the Commissioner of Internal Revenue returned. For all the reasons which we have stated, we are of opinion that the United States is entitled to a decree as matter of law.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.